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No. 2859

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHIN AH YOKE, alias JANE DOE,

Appellant,

vs.

EDWARD WHITE, Commissioner of Immigration for the Port of San Francisco,

In the Matter of CHIN AH YOKE, alias JANE DOE on Habeas Corpus,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed

JAN 15 1917

F. D. Monckton,

Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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Upon Appeal from the United States District Court for the Northern District of California,
First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names of Attorneys of Record.

GEO. A. McGOWAN, Esq., Attorney for Petitioner and Appellant.

JOHN W. PRESTON, Esq., Attorney for Respondent and Appellee.

In the District Court of the United States, in and for the Northern District of the State of California, Southern Division, Div. No. One.

No. 16,016.

In the Matter of CHIN AH YOKE, *Alias* JANE DOE, on Habeas Corpus.

Praecipe for Transcript on Appeal.

To the Clerk of said Court:

Sir: Please make up Transcript of Appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for writ of Habeas Corpus.
2. Immigration record.
3. Order to show cause.
4. Demurrer to petition.
5. Order sustaining demurrer and denying petition for writ.
6. Notice of Appeal.
7. Petition for appeal.
8. Assignment of errors.
9. Order allowing appeal.
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13. Citation on Appeal (Copy).
14. Clerk's certificate.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant.

[Endorsed]: Filed Aug. 19, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[1*]**

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 16,016.

In the Matter of CHIN AH YOKE, *Alias* JANE DOE, on Habeas Corpus.

Petition for Writ of Habeas Corpus.

The petition of Chin Ah Yoke respectfully shows:

That your petitioner is sometimes known as Ah Yoke, and is charged in the proceeding hereinafter referred to as Jane Doe, *alias* Wong Ah Mui, and that she is unlawfully imprisoned, detained, confined and restrained of her liberty by Edward White, the Commissioner of Immigration for the Port of San Francisco, at the Immigration station at Angel Island, county of Marin, State and Northern District of California.

That the said imprisonment, detention, confinement and restraint are illegal, and the illegality thereof consists in this, to wit, that it is claimed by the said Commissioner of Immigration that the said petitioner is an alien person who entered the United

*Page-number appearing at foot of page of original certified Transcript of Record.

States on or about the 7th day of October, 1912, through the port of San Francisco, where she had arrived upon the SS. "Shinyo Maru," and that she was thereafter permitted to enter the United States, and the said petitioner continued to reside in the United States from said last-mentioned date until the present time, and further that upon the first day of September, 1915, a warrant of arrest for the said petitioner, under the name of Jane Doe, was issued by the Secretary of Labor, wherein it was charged that the said detained was an alien who had been found practicing immoral pursuits since her entry into the United States, and that after a hearing, under [2]. the authority contained in said warrant of arrest, the said Secretary of Labor did on the 12th day of April, 1916, issue a warrant of deportation against the petitioner, in which it was recited that the said petitioner was an objectionable alien who had followed objectionable pursuits subsequent to her entry in the United States, and that she should be deported to China, the country whence she came. That during the proceedings had under the warrant of arrest above recited your petitioner was released on bail, and that the said petitioner, in compliance with the order of the Commissioner of Immigration was surrendered into, and is now in the custody of the said Commissioner of Immigration, and it is further claimed by the said Commissioner that he now holds the said petitioner in his possession, by virtue of said warrant of deportation, and that it is his purpose and intention to execute the said warrant of deportation by causing the detained to be deported on the

SS. "Shinyo Maru" sailing from the port of San Francisco at One P. M., on or about the 22d day of April, 1916, and it is further claimed by the said Commissioner that the action of the said Secretary of Labor, of himself as such Commissioner, and his subordinate officers in the premises, is authorized by the provisions of the Act of Congress of February 20th, 1907, which act is entitled: "An Act to regulate the immigration of aliens into the United States," and the Act amendatory thereof of March 26th, 1910.

But on the contrary your petitioner alleges that she is not an alien, but a native-born citizen of the United States of America, having been born on or about the 23d day of March, 1896, at No. 708½ Commercial St., in the city and county of San Francisco, State of California, of parents of the Chinese race then lawfully domiciled within the United States, and your affiant's father, Chin Duck Quong, has ever since been, and is now lawfully domiciled within [3] the United States, and that your petitioner's mother, Lee Shee, was at the time of the birth of your petitioner lawfully domiciled within the United States, and continued to reside herein until the time of her death, on or about the 20th day of June, 1900, at the family domicile at No. 708½ Commercial St., in the city and county, State aforesaid, and that your petitioner has resided continuously within the United States from the time of her birth up to the present time, and in support of the said fact your petitioner offered at the hearing before the said Commissioner the sworn affidavit of your petitioner,

the affidavit of your petitioner's father, the said Chin Duck Quong, the affidavit of Ho Shee, a Chinese woman who lived in the building in which your petitioner was born, and knew your petitioner from the time of her birth, and took care of, and raised your petitioner, after the death of your petitioner's mother, the affidavit of Chin Shee, a Chinese woman who has known your petitioner since your petitioner's birth, and knows that your petitioner is a citizen of this country, and has always resided herein, together with the affidavit of Chin Pak, who has known your petitioner since your petitioner was two or three years of age. Each of the said affidavits hereinabove referred to are annexed hereto in Exhibit "A," hereinafter mentioned, and your petitioner now specifically refers to said affidavits, with the same force and effect, as if the said affidavits, and each of them, were set forth in full herein, and immediately upon the arrest of your petitioner, and at all times thereafter your petitioner has maintained that she was a native-born citizen of the United States of America, and denied that she was the Wong Ah Mui, as claimed by the said Commissioner, and that the showing made by your petitioner of the fact that she was a native-born citizen of the United States of America was more than a *prima facie* showing of the existence of the said [4] American citizenship of your petitioner, and your petitioner alleges that it was an abuse of discretion upon the part of the said Secretary of Labor and the said Commissioner of Immigration, and the immigration officials acting under, or in pursuance

of their orders, to have ignored or decided against the said *prima facie* showing without first having examined and investigated the same, and your petitioner alleges that although the affidavits attesting the citizenship of your petitioner were filed with the said Commissioner, in opposition to the claim and contention of the said Commissioner that your petitioner was Wong Ah Mui, who had first entered the United States upon the 7th day of October, 1912, the said Commissioner, and the said Secretary of Labor violated the discretion committed to them by statute in such cases made and provided, and ignored and disregarded the said showing of citizenship, upon behalf of your petitioner, and failed and neglected to conduct an investigation or examination of the witnesses who had subscribed and sworn to the said affidavits, and the said Commissioner afforded your petitioner only the semblance of a hearing upon the question of her citizenship, in which they decided that she was not a citizen of the United States, without examining or conducting any investigation of the witnesses who were the affiants of affidavits presented by your petitioner.

Your petitioner further alleges that the said Secretary and the said Commissioner further abused the discretion committed to them by the statutes in such cases made and provided, in the following particulars, that is to say, that the said Commissioner of Immigration in denying the request of your petitioner to submit in the record and case of your petitioner, as the same was pending before the said Commissioner, the warrant of arrest, and the evi-

dence issued in support thereof, for a certain Gum Chim *alias* Bow Heung, which said warrant was issued by the Secretary of Commerce [5] and Labor under date of January 17th, 1911, and your petitioner alleges that the refusal of the said Commissioner to so place in the record of your petitioner, the said warrant of arrest, and the evidence upon which the said warrant of arrest was based by ruling that the said evidence was immaterial, was an abuse of the discretion committed to the said Commissioner, and deprived your petitioner of material evidence, which would have shown the presence of your petitioner in the United States, and that your petitioner was not the Wong Ah Mui referred to by the said Commissioner as having first entered the United States upon the 7th day of October, 1912, but that your petitioner had been identified as having been in the United States for upwards of a year prior to the said time, your petitioner having been identified to the said Commissioner, and that notwithstanding your petitioner requested that the said evidence be so submitted and made a part of the record herein, the said Commissioner reserves to himself the right to rule that the said evidence was immaterial, and by refusing to place the said evidence in the record, to thus finally determine the relevancy of the said record himself, and prevent the same being reviewed or passed upon by the Secretary of Labor, and the Secretary of Labor in affirming and approving the said action of the said Commissioner, did, your petitioner alleges, upon her information and belief violate and abuse of discretion committed to him

by the statutes in such cases made and provided, and the action of the said Commissioner and the said Secretary in the premises has deprived and prevented your petitioner from a fair hearing and due process of law, all in violation of the terms and provisions of Articles 4 and 5 on amendment to the Constitution of the United States of America, in each of the following particulars; First, that the warrant of arrest herein is not supported by oath or affirmation, second, that your petitioner has been deprived of her liberty without **[6]** due process of law, and your petitioner further alleges that the hearing accorded in said matter was unfair, and the keeping of your petitioner, incommunicado, in detention, without permitting her friends to communicate with her, or her to communicate with her friends, for about a period of twenty-one days after her arrest, was an abuse of discretion, and prejudiced the rights of your petitioner, and deprived and prevented her from a fair and adequate hearing in which she could present adequate evidence in opposition to the charge made against her, and the action hereinabove referred to placed the evidence which your petitioner was able to present in a prejudicial light before the said Commissioner and the said Secretary; and your petitioner further alleges, upon her information and belief that the evidence presented upon her behalf as a native-born citizen of the United States was of such a conclusive character, that to disregard the same was an abuse of discretion on the part of the officers who decided the same adversely to your petitioner.

That your petitioner has in her possession a complete copy of the record and evidence submitted in the said matter, and the same is hereunto annexed and marked Exhibit "A," save and except that there is not attached thereto the report or opinion of the Commissioner-General of Immigration, or the Secretary of Labor, other than the warrant of deportation, for the reason that said papers are not within the jurisdiction of this court, and time does not elapse for your petitioner to obtain the same before the deportation hereinafter complained of will be affected.

That this petition is made by your petitioner on her own behalf, and a photographic likeness of herself is affixed to the affidavit in Exhibit "A," hereinbefore mentioned.

That petitioner further alleges that she is not a prostitute or a woman of ill repute, as claimed by the said Commissioner [7] and the said Secretary.

That it is the intention of the said Commissioner to deport your petitioner out of the United States, the land of her nativity and birth, and of which she is a citizen, by the SS. "Shinyo Maru," sailing from the port of San Francisco, at One P. M. on the 22d day of April, 1916, and unless this Court intervene, your petitioner will be carried away from the land of her nativity and birth, and of which she is a citizen, all in violation of the rights of your petitioner, as hereinbefore set forth.

WHEREFORE, your petitioner prays that a writ of habeas corpus may issue, directed to the said Edward White, Commissioner of Immigration of the said port of San Francisco, staying the order of de-

portation, and directing him to produce the body of your petitioner before your Honor at a time and place to be specified in said matter, together with the time and cause of detention of said detained.

Dated at San Francisco, Cal., April 21st, 1916.

CHIN AH (Chinese Characters) YOKE,
Petitioner.

United States of America,
State and Northern District of California,—ss.

Chin Ah Yoke, being first duly sworn, deposes and says:—

That she is the petitioner named in the foregoing petition that the same has been read and explained to her, and *he* knows the contents thereof; that the same is true of her own knowledge, except as to those matters which are therein stated on her information and belief, and as to those matters she believes it to be true.

CHIN AH (Chinese Characters) YOKE.

Subscribed and sworn to before me this 21st day of April, 1916.

[Seal] E. L. KIMMEL,
Notary Public in and for the County of Marin, State of California. [8]

(Here follows Exhibit "A.")

[Endorsed]: Filed Apr. 22, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [9]

In the District Court of the United States, in and for the Northern District of the State of California, Division No. 1.

No. 16,016.

In the Matter of CHIN AH YOKE, *Alias* JANE DOE, on Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor, and upon reading the verified petition on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the port and District of San Francisco, appear before this Court on the 29th day of April, 1916, at the hour of ten o'clock A. M. of midday, to show cause, if any he has, why a writ of habeas corpus should not be issued herein as prayed for, and that a copy of this order with said petition be served upon the said Commissioner.

AND IT IS FURTHER ORDERED that the said Edward White, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of said Commissioner, or the Secretary of Labor, shall have the custody of the said Chin Ah Yoke, are hereby ordered and directed to retain the said Chin Ah Yoke within the custody of the said Commissioner of Immigration and within the jurisdiction of this court until its further order herein.

Dated, San Francisco, California, April 22d, 1916.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: Filed Apr. 22, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[10]**

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 16,016.

In the Matter of CHIN AH YOKE, *alias* JANE DOE, on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration of the port of San Francisco, in the State and Northern District of California, and demurs to the petition for a Writ of Habeas Corpus in the above-entitled cause and for grounds of demurrer alleges

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a Writ of Habeas Corpus, or for any relief thereon;

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the Writ of Habeas Corpus be denied.

JNO W. PRESTON,
United States Attorney.
CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Presented in open court and filed April 29, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [11]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Saturday, the 29th day of April, in the year of our Lord, one thousand nine hundred and sixteen. PRESENT: The Honorable M. T. DOOLING, Judge.

No. 16,016.

In the Matter of CHIN AH YOKE, on Habeas Corpus.

Minutes of Court—April 29, 1916—Hearing on Demurrer to Petition for Writ of Habeas Corpus.

This matter came on regularly this day for hearing of the Order to Show Cause as to the issuance of a Writ of Habeas Corpus herein and motion to admit detained to go at large upon bail. Geo. A. McGowan, Esq., was present as attorney for petitioner and detained. C. A. Ornbaun, Esq., was present as Assistant United States Attorney on behalf of respondent, and filed a Demurrer to the Petition for Writ and also presented the Immigration Records as to the detained. After hearing Mr. McGowan, the Court order that said Immigration Records be filed herein as Respondent's Exhibit "A" and that the same be considered as a part of the said original Petition. Said matters were then argued by respective counsel and ordered submitted. [12]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 16,016.

In the Matter of CHIN AH YOKE, on Habeas Corpus.

Order Sustaining Demurrer to Petition to Writ of Habeas Corpus.

GEORGE A. McGOWAN, Esq., Attorney for Petitioner.

JOHN W. PRESTON, Esq., United States Attorney and CASPER A. ORNBAUN, Esq., Assistant United States Attorney, Attorneys for Respondent.

ON DEMURRER TO PETITION FOR A WRIT OF HABEAS CORPUS.

The demurrer to the petition for a Writ of Habeas Corpus herein is sustained, and said petition denied.

June 12th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 12, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [13]

In the District Court of the United States, in and for the Northern District of the State of California, First Division.

No. 16,016.

In the Matter of CHIN AH YOKE, *alias* JANE DOE, on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court and to the Honorable JOHN W. PRESTON, United States Attorney for the Northern District of California.

You and each of you will please take notice that Chin Ah Yoke, the petitioner and the detained, above named, does hereby appeal to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, from the order made and entered herein on the 12th day of June, 1916, denying the petition for a writ of habeas corpus filed herein.

Dated at San Francisco, California, June 16th, 1916.

GEO. A. McGOWAN,

Attorney for Petitioner and Detained and Appellant. **[14]**

In the District Court of the United States, in and for the Northern District of the State of California, Division No. 1.

No. 16,016.

In the Matter of CHIN AH YOKE *alias* JANE DOE, on Habeas Corpus.

Petition for Appeal.

Now comes Chin Ah Yoke, *alias* Jane Doe, the petitioner, the detained and the appellant herein, and says:

That on the 12th day of June, 1916, the above-entitled court made and entered its order denying the petition for a writ of habeas corpus, as prayed for, on file herein, in which said order in the above-entitled cause certain errors were made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herewith.

WHEREFORE, this appellant prays that an appeal may be granted in her behalf to the Circuit Court of Appeals of the United States, for the Ninth Circuit thereof, for the correction of the errors so complained of, and further, that a transcript of the record, proceedings and papers in the above-entitled cause, as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, for the Ninth Circuit thereof.

Dated at San Francisco, California, June 16th, 1916.

GEO. A. McGOWAN,

Attorney for Petitioner, Detained and Appellant.

In the District Court of the United States, in and for the Northern District of the State of California, First Division.

No. 16,016.

In the Matter of CHIN AH YOKE, *alias* JANE DOE, on Habeas Corpus.

Assignment of Errors.

Comes now, Chin Ah Yoke, *alias* Jane Doe, by her attorney, George A. McGowan, Esquire, in connection with her petition, for an appeal herein, assign the following errors, which she avers occurred upon the trial or hearing of the above-entitled cause, and upon which she will rely, upon appeal to the Circuit Court of Appeals, for the Ninth Circuit, to wit:

First. That the Court erred in denying the petition for a writ of habeas corpus herein.

Second. The Court erred in holding that it had no jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

Third. That the Court erred in not holding that the allegation contained in the petition herein for a writ of habeas corpus, were sufficient in law, to justify the granting and issuing of a writ of habeas corpus, as prayed for, in said petition.

Fourth. That the Court erred in not holding that the Secretary of Labor could not issue a warrant of arrest without reasonable cause and not supported by the oath of affirmation.

Fifth. That the Court erred in not holding that a native-born citizen of the United States is entitled

of right to a hearing before the judicial branch of the Government may be deported out of the United States. [16]

Sixth. That the Court erred in holding that the immigration authorities had accorded the appellant a fair hearing in the executive deportation proceeding.

SEVENTH. That the Court erred in holding that the Commissioner of Immigration could suppress and refuse to incorporate in the record, evidence requested by the petitioner upon her behalf.

WHEREFORE, the appellant prays that the judgment and order of the United States District Court, in and for the Northern District of the State of California, made and entered herein in the office of the clerk of the said court on the 12th day of June, 1916, discharging the order to show cause and dismissing the petition for a writ of habeas corpus be reversed and that this cause be remitted to the said lower court with instructions to discharge the said Chin Ah Yoke from custody, or grant her a new trial before the lower court, by directing the issuance of a writ of habeas corpus, as prayed for in said petition.

Dated San Francisco, California, June 16th, 1916.

GEO. A. McGOWAN,
Attorney for Appellant.

Service of the within Notice of, Petition for Appeal and Assignment of Errors and receipt of a copy

thereof is hereby admitted this 16th day of June, A. D. 1916.

JNO. W. PRESTON,
U. S. Atty.
C. A. O.

[Endorsed]: Filed Jun. 23, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [17]

In the District Court of the United States, in and for the Northern District of the State of California, First Division.

No. 16,016.

In the Matter of CHIN AH YOKE, *alias* JANE DOE, on Habeas Corpus.

Order Allowing Petition for Appeal.

On this 16th day of June, 1916, came Chin Ah Yoke, the petitioner and the detained, herein, by her attorney, George A. McGowan, Esquire, and having previously filed herein, did present to this Court her petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, intended to be urged and prosecuted by her, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein, was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

ON CONSIDERATION WHEREOF, the Court hereby allows the appeal herein prayed for, and

orders execution and remand stayed pending the hearing of the said case in the said United States Circuit Court of Appeals for the Ninth Circuit, and that the appellant may be released upon bond in the sum of one thousand dollars $1,000, during the further proceeding to be had herein and in default of said bail, the said Edward White, Commissioner of Immigration of the port of San Francisco retain her within the jurisdiction of this court, to abide by whatever judgment may be finally entered herein. If the appeal be not diligently prosecuted the Government may apply [18] for an order revoking the admission to bail.

Dated at San Francisco, Cal., June 23d, 1916.

M. T. DOOLING,
United States District Judge.

Service of the within order and receipt of a copy thereof is hereby admitted this 24th day of June, A. D. 1916.

JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: Filed Jun. 23, 1916. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [19]

Citation (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Hon. EDWARD WHITE, Commissioner of Immigration for the Port of San Francisco and to His Attorney, JOHN W. PRESTON, Esq., United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the United States District Court for the Northern District of California, First Division, wherein Chin Ah Yoke, *alias* Jane Doe is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, First Division, this 23d day of June, A. D. 1916.

M. T. DOOLING,
United States District Judge.

Service of the within Citation and receipt of a copy thereof is hereby admitted this 24th day of June, 1916.

JNO. W. PRESTON,
U. S. Attorney.

Copy of the within Citation on Appeal is lodged with the clerk of this court this 24th day of June, A. D. 1916. In witness whereof I have hereunto set my official hand and seal.

W. B. MALING,
Clerk.
By C. W. Calbreath,
Deputy.

[Endorsed]: Filed Jun. 23, 1916. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [20]

In the District Court of the United States, in and for the Northern District of the State of California, Southern Division, Div. No. One.

No. 16,016.

In the Matter of CHIN AH YOKE, *alias* JANE DOE, on Habeas Corpus.

Cost Bond on Appeal.

MASSACHUSETTS BONDING AND INSURANCE COMPANY.

KNOW ALL MEN BY THESE PRESENTS, That we, Chin Ah Yoke, *alias* Jane Doe, as principal, and Massachusetts Bonding and Insurance Company, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five hundred (500) dollars, to be paid to the said United States of America, its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of August, in the year of our Lord, one thousand nine hundred and sixteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a matter pending in said court, for a writ of habeas corpus an order was en-

tered against the said Chin Ah Yoke, *alias* Jane Doe, sustaining a demurrer to her petition for a writ of habeas corpus and denying the petition for the writ, and she having obtained from said court an order allowing an appeal to reverse the said order [21] in the aforesaid matter, and a citation directed to the respondent citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Chin Ah Yoke, *alias* Jane Doe, shall prosecute said appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation be void; else to remain in full force and virtue.

CHIN AH (Chinese Characters) YOKE,
Alias, etc. (Seal)

MASSACHUSETTS BONDING AND INSURANCE COMPANY. (Seal)

By JOHN H. ROBINSON, (Seal)
Its Attorney in Fact.

Attest: FRANK M. HALL,
Attorney in Fact.

Acknowledged before me the day and year first above written, by Chin Ah Yoke, *alias* Jane Doe, the principal in and to the foregoing bond.

FRANCIS KRULL, (Seal)
United States Commissioner, North'n Dist. of California. [22]

State of California,
City and County of San Francisco,—ss.

On this 18th day of August, A. D. 1916, before me, Grace R. Schmitt, a notary public in and for the city and county of San Francisco, personally appeared, John H. Robertson, Attorney in Fact, and Frank M. Hall, Attorney in Fact of the Massachusetts Bonding and Insurance Company, to me personally known to be the individual and officers described in and who executed the within instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the written instrument is the corporate seal of said company aforesaid, and that said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, the day and year first above written.

[Seal] GRACE R. SCHMITT,
Notary Public in and for the City and County of San Francisco, State of California.

Cost bond approved.

Casper A. Ornbaun,
Assist. U. S. Atty.

[Endorsed]: Filed Aug. 19, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [23]

Respondent's Exhibit "A"—Immigration Record.

Bureau of Information Recd. Exec. Divn.
Form 8B

(TIME STAMP)

WARRANT—DEPORTATION OF ALIEN.
12020

1589 UNITED STATES OF AMERICA,
U. S. DEPARTMENT OF LABOR.

No. 54012/116 Washington.

To EDWARD WHITE, Commissioner of Immigration, Angel Island Station, San Francisco, Cal.

WHEREAS, from proofs submitted to me, after due hearing before Immigrant Inspector J. X. Strand, held at Angel Island, Cal., I have become satisfied that the alien AH YOKE, *alias* JANE DOE, *alias* WONG AH MUI, *alias* WONG SHEE, *alias* WONG MOY, who landed at the port of San Francisco, Cal., ex. SS. "Shinyo Maru," on the 7th day of October, 1912, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, to wit:

That she is a prostitute and has been found practicing prostitution subsequent to her entry into the United States, and may be deported in accordance therewith:

I, W. B. Wilson, Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return

the said alien to China, the country whence she came, at the expense of the appropriation "Expenses of Regulating Immigration, 1916." You are directed to purchase transportation for the alien from San Francisco, Cal., to her home in China, at the lowest available rate, payable from the above-named appropriation.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 12th day of April, 1916.

[Seal] W. B. WILSON,
Secretary of Labor. [24]

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

12020/1589. Office of the Commissioner.
San Francisco, Cal.
March 17, 1916.

Commissioner-General of Immigration,
Washington, D. C.

Transmitted herewith is the record of the hearing in the case of Jane Doe, *alias* Ah Yoke, *alias* Wong Ah Mui, arrested under Departmental warrant dated September 2, 1915, No. 54012/116. It will be noted that the record is slightly out of chronological order, due to the fact that the formal request for the warrant of arrest does not indicate what, if any, evidence was transmitted therewith; for which reason the transcript of testimony of Wong Him Sing (the man who was in company with the alien at the time of her apprehension), taken on Septemebr 1st and 2d, is appended to the record.

This alien was found by Inspector Robinson of this service in the room of a Chinaman in a local Chinese hotel, about 7 o'clock in the morning; and the statement that she is a prostitute, made by the man to Inspector Robinson, together with the fact that she had previously visited his room on various occasions, although an entire stranger, sustains the charge in the warrant that the woman is a prostitute and has been found practicing prostitution subsequent to her entry. The infamous character of the hotel is substantiated by the affidavit of Miss Donaldina Cameron. From information received from confidential sources this office was enabled to locate the record of this woman's admission to the United States in 1912, as the alleged wife of a native, which fact establishes her alienage and conclusively disproves her claim of American nativity. As might be expected, she of course denies that she is the person admitted on the record in question (No. 11266/32029, Wong Ah Mui, ex. SS. "Shinyo Maru" Oct. 7, 1912); but this office [25] is more than satisfied, from a comparison of the enlarged photographs of the defendant with that of the person so admitted, that they are identical. Such enlarged photographs are appended hereto in a file marked "exhibits," and it will be noted therefrom that there are physical peculiarities in common—notably pitmarks over the inner corner of the right eye and over the left corner of the mouth. A tracing of the profile and the ear of the photograph of the woman admitted in 1912 (designated as No. 2) has been made, which will be found to exactly fit the profile and ear of the defend-

ant (photograph No. 3), the apparent difference between the distance from the outer rim of the ear to the point of the nose in the two photographs mentioned, being accounted for by the fact that, in photograph No. 3, the head is slightly turned toward the camera, which fact, from a test made in this office, apparently increases the distance between the points named. The formation of the ears in photographs one and four, as well as in photographs 2 and 3, is identical.

To meet the burden of proof resting upon the defendant, affidavits of the woman under arrest, of her alleged father, and of three other Chinese persons, have been introduced, all of which are intended to establish her claimed American birth; but in the opinion of this office that showing is far from convincing, even in the absence of the—to my mind—conclusive proof presented by the landing record referred to. In view of the above facts it is recommended that a warrant of deportation issue.

It will be noted that the attorney of record has protested and excepted to the fact that the alien was held incommunicado from the date of her arrest until counsel was permitted to enter the proceedings; to the admission of the testimony of Wong Him Sing (taken into custody in company with the alien) on the ground [26] that the alien was not present with counsel; and to the fact that the privilege of cross-examination was not accorded; and has requested that the latter witness be recalled for the defense. It is believed that the action of this office was in no way prejudicial to the interest of the alien,

and was entirely in accord with the regulations. It has assumed the position, and has so advised the attorney, that the further testimony of Wong Him Sing will be taken if his production is secured by counsel, this office having no power or process by which to compel his attendance as a witness, nor funds from which to defray the expense incident thereto. As to the right of cross-examination, it would appear that adjudicated cases hold that such privilege cannot be claimed as a right. The attorney's demand that testimony and warrants referring to a certain Gum Chi or Bow Heung be made a part of the record has been denied, first on the ground that the statements referred to were not made of record, and secondly, because they were subsequently shown to be immaterial.

Exact copy as signed by

W. T. Boyce.

Mailed this day by K., Acting Commissioner.
WHW/ASH.
Inclosure No. 26567. [27]

U. S. DEPARTMENT OF LABOR.
IMMIGRATION SERVICE.

12020/1589 Office of the Commissioner.
San Francisco, Cal.
March 17, 1916.

Geo. A. McGowan, Esq.
Attorney-at-Law,
Bank of Italy Bldg., San Francisco.

Sir:

With reference to the case of Jane Doe, *alias* Wong Ah Mui, *alias* Ah Yoke, arrested under De-

partmental warrant dated September 2 last, and which you represent as counsel, you are advised that the transmittal of this record to the Department has been unavoidably delayed until this date, when the record is being sent forward.

In connection therewith it is noted that you filed a brief of exceptions, wherein you protest against the admission of the testimony of Wong Him Sing on the ground that the detained was not confronted by said witness and was not accorded the privilege of cross-examination by counsel, as a result of which you request the recall of that witness. In reply thereto you are advised that it is the understanding of this office that said witness lives in Yuma, Arizona, and that he was only in this city on a visit at the time the defendant was taken into custody; and that this office has no authority or process by which his attendance as a witness could be compelled, or funds from which to defray the expenses incident thereto. It is unnecessary to state, however, that it is the desire of this office to hear all witnesses in the alien's behalf, and that if you wish to introduce this man as your witness, and have any means by which to accomplish that purpose, an opportunity will be accorded for the taking of such additional testimony. With regard to your further request that there be made part of the record [28] statements of girls in a Presbyterian Mission who identified the defendant as Gum Chi or Bow Heung, and that there be produced for your inspection the warrant of arrest for the last-mentioned person, you are advised that it does not appear from the record that

those statements were recorded, and the first part of your request cannot therefore be complied with. You are informed, however, that these references in the record to Gum Chi and Bow Heung are entirely immaterial, and the introduction of the warrant of arrest in that case cannot therefore serve any useful purpose.

Respectfully,

Exact copy as signed by

W. T. BOYCE,

Mailed this day by K.,

Acting Commissioner.

WHW/ASH. [29]

Bureau of Immigration.

Form 8A.

WARRANT—ARREST OF ALIEN.

UNITED STATES OF AMERICA,

U. S. DEPARTMENT OF LABOR.

12020 Washington. (Time Stamp)

1589

No. 54012/116

To SAMUEL W. BACKUS, Commissioner of Immigration, Angel Island Station, San Francisco, California, or to Any Immigrant Inspector in the Service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien JANE DOE, who landed at an unknown port, on or about the 1st day of July, 1915, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, for the following among other reasons:

That she is a prostitute and has been found practicing prostitution subsequent to her entry into the United States.

I, J. B. Densmore, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant her a hearing to enable her to show cause why she should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1916." Pending disposition of her case the alien may be released from custody upon furnishing satisfactory bond in the sum of $1,000.00.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 2d day of September, 1915.

[Seal] J. B. DENSMORE,
Acting Secretary of Labor.

RHH. ID. [30]

APPLICATION FOR WARRANT OF ARREST UNDER SECTIONS 20 AND 21 OF THE ACT OF FEBRUARY 20, 1907.

12020/1589.

U. S. DEPARTMENT OF LABOR.
Immigration Service.
(Place) San Francisco, Calif.

Confirming telegraphic request.

September 4, 1915.

The undersigned respectfully recommends that the Secretary of Labor issue his warrant for the arrest

of Jane Doe (Chinese), the alien named in the attached certificate, upon the following facts which the undersigned has carefully investigated, and which, to the best of his knowledge and belief, are true:

(1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the knowledge of the informants.)

Alien found in compromising surroundings with a man. Both detained. Man later released when landing was verified, as son of Native. Man stated to Inspector Robinson that woman was a prostitute. Alien as yet refuses to talk. It is believed that she may be Gum Chi, *alias* Bow Heung, warrant number 53210/76, dated June 17, 1911.

(2) The present location and occupation of above-named alien are as follows: At this Station.

Pursuant to Rule 22 of the Immigration Regulations there is attached hereto and made a part hereof the certificate prescribed in subdivision 2 of said Rule, as to the landing or entry of said alien, duly signed by the immigration officer in charge at the port through which said alien entered the United States.

Exact copy as signed by

SAMUEL W. BACKUS,

Mailed this day by K.,

(Official title.)
Commissioner.

WNS–JO. [31]

Bureau of Immigration.

Form 8A.

WARRANT—ARREST OF ALIEN.

UNITED STATES OF AMERICA.

U. S. DEPARTMENT OF LABOR.

12020 Washington. (Title Stamp)

1589

No. 54012/116

To SAMUEL W. BACKUS, Commissioner of Immigration, Angel Island Station, San Francisco, California, or to Any Immigrant Inspector in the Service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien JANE DOE, who landed at an unknown port, on or about the 1st day of July, 1915, has been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, for the following among other reasons:

That she is a prostitute and has been found practicing prostitution subsequent to her entry into the United States.

I, J. B. Densmore, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said alien and grant her a hearing to enable her to show cause why she should not be deported in conformity with law.

The expenses of detention hereunder, if necessary, are authorized, payable from the appropriation "Expenses of Regulating Immigration, 1916." This warrant supersedes and cancels warrant of arrest issued in this case on September 2, 1915.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 11th day of September, 1916.

[Seal] J. B. DENSMORE,
Acting Secretary of Labor.

RHH. ID. [32]

U. S. DEPARTMENT OF LABOR.
Immigration Service.

No. 12020/1589. Angel Island, Cal.,
September 1, 1915.

Statement of WONG HIM SING, *alias* WONG GWEE TING, Taken into Custody on the Morning of September 1, 1915.

Examining Inspector, J. X. STRAND.
Interpreter, LOUIS FON.
Stenographer, L. E. DINKLAGE.

Testimony of Wong Him Sing.

Witness sworn.

Q. What are your names?

A. Wong Him Sing and Wong Gwee Ting.

Q. Are others? A. No others.

Q. How old are you? A. 34.

Q. Where were you born?

A. Colusa, California.

Q. Have you any documentary evidence to support that statement?

A. On file in your office. (File No. 13177/1–20 covers his last entry when he was landed as a native.)

Q. What is your business?

A. Cook in Yuma, Arizona.

Q. Where do you reside?

(Testimony of Wong Him Sing.)

A. I have been stopping at a Chinese hotel in San Francisco since I came here. Mon Ming, Clay Street.

Q. How long have you been stopping at that hotel?

A. Five days.

Q. What room did you have there? A. 307.

Q. When you came there five days ago were you accompanied by anyone? A. No.

Q. You were found in that room and building early this morning by an inspector of this Service, were you not? A. Yes.

Q. Who was the girl that was in that room with you?

A. She is one of the visitors in my room, because I had a bath in that room she came there to take a bath this morning.

Q. What hour did she come to your room for the purpose of getting a bath? A. Six o'clock.

Q. (In English.) You told me 5 o'clock, which was it?

A. I have no clock; it was between that time. [33]

Q. (Through interpreter.) Did the girl take the bath in your room as you state? A. Yes.

Q. In your presence?

A. I was in bed, half asleep.

Q. What hour were you apprehended by the inspector this morning?

A. I have no watch or clock, it must be about 7 o'clock.

Q. What was the girl doing in your room from the time she had entered there, you state about 5 or 6

(Testimony of Wong Him Sing.)

o'clock, up to 7 o'clock when you were apprehended?

A. She was visiting me and talked with me; have conversation.

Q. In what manner did she enter your room? How did she get in there?

A. First she rapped at the door and I opened the door for her. She told me that day before she would come to my room and take a bath there.

Q. You got up?

A. Yes I got up, opened the door for her, and let her in.

Q. Where did you make the arrangements with her the day previous relative to her taking this bath?

A. She telephoned to me. I don't know where she telephoned from.

Q. Were you in your room at the time?

A. Yes.

Q. What hour of day or night was it she telephoned to you?

A. Between 11 and 12 o'clock last night.

Q. Has she ever been in your room on any prior occasion than this morning?

A. Yes, she has been there twice since I have been there.

Q. When did she go to your room the first time and for what purpose?

A. To visit me during the daytime.

Q. When?

A. Last Saturday, between 2 and 3 o'clock in the afternoon.

Q. For what purpose did she go to your room at

(Testimony of Wong Him Sing.)

that time? A. To see me. [34]

Q. For what purpose?

A. Just a friendly visit; have a talk with me.

Q. How long did she remain at that time?

A. Little over an hour.

Q. When did you again see her in your room?

A. She came again Monday between 7 and 8 o'clock in the evening.

Q. For what purpose did she come at that time?

A. She informed me through the telephone before that hour, that she would call on me and see me.

Q. And when she came to your room what purpose did she state she had in seeing you at that time?

A. She wanted to visit me.

Q. How long did she remain Monday?

A. Over ten minutes.

Q. What is her business?

A. I don't know what her occupation is or what she is doing for a living.

Q. How long have you known her?

A. About two weeks.

Q. Where did you first become acquainted with her?

A. First got acquainted with her in the same hotel, Mon Ming Hotel, *where* I was there one night.

Q. Did you occupy the same room with her that night? A. No.

Q. How did you become acquainted with her?

A. In the office at the hotel.

Q. State the circumstances under which you became acquainted with her.

(Testimony of Wong Him Sing.)

A. I got into conversation with her and became acquainted with her and she asked me what room I lived in, she wanted to come up and see me.

Q. Do you not know of your own knowledge that this girl is a prostitute?

A. I could not state positively whether she is a prostitute or not.

Q. Have you had any immoral relations with her?

A. No.

Q. Did you ever learn of anyone that did?

A. No.

Q. What is your impression of her?

A. It is my impression—[35] I could not say she is a moral person or I could not say she is immoral.

Q. Do you consider it a proper thing for a girl or woman to visit you at the late and unusual hours you state she visited you and come there to take a bath, as you state she did?

A. Of course, not a moral person would do that in my belief.

Q. What is her name?

A. She told me her name was Ah Heung and I always called her Ah Heung.

Q. What is her family name?

A. I don't know.

Q. Did you ever give her any money at any time?

A. She asked me for money but I did not give her any.

Q. Why did she ask you for money?

A. To make her a loan of a few dollars.

(Testimony of Wong Him Sing.)

Q. Are you a married man? A. Yes.

Q. You consider that a proper thing for a married man to have strange women visiting your room at late and unusual hourse?

A. That would not be right.

Q. Why do you permit it then?

A. Because she wanted to come to my place and I could not prevent her from doing so.

Q. When the inspector went to your room this morning, did you have your street clothes on at that time? A. No, I was in bed.

Q. Where did you put on your street clothes?

A. I put them on on the fire escape.

Q. Was the girl you were with in street clothes, or what was her condition?

A. She had most of her clothes on except the overcoat, street coat.

(Girl brought before witness.)

Q. Was this the girl you have been referring to as visiting you on various occasions, and who was found in bed with you this morning? A. Yes. [36]

Inspector Swasey takes the examination.

Q. For whom are you working in Yuma?

A. Candacu (Mexican place).

Q. Did you ever have any difficulty with the police authorities in Los Angeles? A. Yes.

Q. What was it?

A. There were some Chinese smuggled from Mexico and they went into my restaurant in Los Angeles for hiding, and afterward I accompanied them on an auto stage. I was on the same stage to

(Testimony of Wong Him Sing.)

go to some suburb of Los Angeles and I was taken in custody with the crowd and I found that I had no money at that time and pleaded guilty and I was sentenced to ten months in prison for that trouble.

Q. Did you serve your time? A. Yes.

Q. In the city prison, Los Angeles? A. Yes.

Q. When were you released?

A. First month of this year (about February).

Q. Did you know the girl who was taken into custody with you this morning before you came to San Francisco this time? A. No.

Q. Never saw her before? A. No.

Q. How did you become acquainted with her?

A. In the office of the hotel.

Q. Who introduced you to her, if anybody?

A. Just met her in the hotel lobby.

Q. Did you and the woman who was taken into custody with you this morning, occupy the same room and bed last night? A. No.

Q. Is it not a fact that when our officer entered the room you tried to escape by the fire escape, putting your clothes on then?

A. I got frightened and quickly ran out that way.

(Inspector Robinson called.)

Q. Inspector Robinson, I would like to have you make a statement as to the exact conditions you found this man and woman in when you entered the room this morning.

A. When Detective Skelly and I [37] knocked at the door of room 307 in the Mon Ming Hotel on Clay Street near Stockton, a little after 7 A. M., we

(Testimony of Wong Him Sing.)

had to knock several times and finally a man answered from the room adjoining (305 I think, adjoining 307 on the right, with a door connecting the two rooms). We finally told him we were officers and wanted to get in. We got no answer. We heard people moving around in the room and finally the woman I brought to the station opened the door and this man was nowhere to be seen. After searching the room we were unable to find him and we had heard the window raised and the curtain being moved while we were in the hall, and we concluded the man had escaped by the fire escape, so I decided to go to the next floor below to see if I could apprehend him, when Mr. Skelly called me back and had this man, said he found him on the fire escape dressing himself.

Q. When you went into the room and saw him with Mr. Skelly, how much of his clothes did he have on?

A. He had his coat and vest off, had apparently just slipped on his trousers; he was just putting his shoes and shirt on after he came in, and finished dressing while I was in the room.

Q. Did Mr. Skelly say where he had found him?

A. On the fire escape, dressing himself.

Q. Was the door between the room adjoining and the room in which you found him open?

A. Yes, it was.

Q. Was anybody in the adjoining room?

A. No. I wanted to say about the woman, my

(Testimony of Wong Him Sing.)

recollection is the woman put on her slippers while I was there.

Q. Were there any indications to show conclusively that these two people were occupying the same room?

A. There was only one bed there and the pillows showed two people had been occupying the bed.

Q. Was the bed in the room you entered, or the adjoining room? A. The adjoining room. [38]

Q. Was there any place to sleep in the room you entered? A. No.

Q. What would you believe the room was used for if not for sleeping quarters?

A. Those rooms are fixed for apartments. Kitchen and some lockers, apparently used as a dining-room, etc. I asked the man who the woman was and he said the woman was a whore whom he had been sleeping with. We asked how much he had paid her and he said, "Oh, she is a friend of mine and came up here and stayed with me for nothing."

(To witness.)

Q. Have you ever given the woman who was brought over here with you any presents of any kind? A. No.

Q. Have you ever paid her any money?

A. No.

Q. How do you account for the statement that Inspector Robinson has just made that you told him that this woman was a prostitute and you were just sleeping with her last night?

A. No, I did not say so.

(Testimony of Wong Him Sing.)

(Girl called in.)

Q. What is your name?

A. I don't want to tell you my name.

Q. You are informed that your refusal to divulge your real name, or answer any questions which may be asked of you at this time, will only serve to prolong your detention and the ultimate bringing to a close of your case. (No answer.)

Q. Where were you born? A. (No answer.)

Q. How old are you? A. Don't know.

Q. When did you come to the United States?

A. I was born in the United States.

Q. Have you any documentary evidence to show that?

A. I have not here. It is with my attorneys.

Q. Where are your parents?

A. I don't want to tell you anything about them.

Q. How do you expect to leave this station unless you furnish us [39] with information to satisfy us that you are entitled to remain in the United States, you being of the Chinese race?

A. Don't care; I don't want to tell you anything.

Q. Do you realize that you will be held at this station until you make the proper statement to show your right to be in the United States?

A. I don't see why you could deport me, or why I cannot stay in this country.

Q. If you show us the evidence or give us the information to substantiate your claim that you are native born, this office has no reason to detain you any longer. (Refuses to answer.)

(Testimony of Wong Him Sing.)

I hereby certify to the correctness of the foregoing transcript.

L. E. DINKLAGE,
Stenographer. [40]

U. S. DEPARTMENT OF LABOR
Immigration Service.

No. 12020/1589. Angel Island, Cal.
September 2, 1915.

In re WONG HIM SING and Woman Taken into Custody With Him on the Morning of September 1, 1915.

Examining Inspector, J. X. STRAND.
Interpreter (Examination in English).
Stenographer, L. E. DINKLAGE.

Q. I asked you yesterday what was the name of the girl that was found in your room and brought to this station with you, and who was later brought into your presence and identified by you as Ah Heung. A. Yes, she told me Heung.

Q. I will ask you again what is her family name?

A. I don't know her family name.

Q. Did you ever hear her referred to as Gum Chi? A. I never heard that.

Q. Did you ever hear her referred to as Bow Heung? A. I don't know that.

Q. You told me you were going to tell me the truth.

A. I don't know.

Q. What else do you know about her?

A. Mon Ming Hotel office knows her.

(Testimony of Wong Him Sing.)

Q. How many other girls are in that hotel?

A. I just see another one, that is all.

Q. Were you ever in Calexico?

A. Yes, I got pinched once there.

Q. What was the name of your restaurant there?

A. Calexico Cafe.

Q. Were you ever in Tia Juana? A. No.

Q. Do you still own a restaurant in Calexico?

A. I buy it about four months ago.

Q. Were you associated with any Chinese girl while down there in that neighborhood?

A. No. [41]

Q. Did you ever know a girl named Wong Ott or Wong Ark? A. No.

Q. Tell me the truth about the girl you call Ah Heung. Where does she come from?

A. I don't know where she come from. I only know her two weeks ago. I never asked her where she comes from.

Q. How much money have you? A. Not much.

Q. When did you come up to San Francisco last time? A. About two weeks.

Q. Where from? What place?

A. Los Angeles; Calexico and Los Angeles.

Q. Did you come by train from Los Angeles or boat? A. By train.

Q. You came with someone else?

A. No, me, that's all.

Q. Why did you come here? What for?

A. I like to come to see the Fair.

Q. Were you ever in San Luis Obispo?

(Testimony of Wong Him Sing.)

A. No, never.

Q. Before when you have trouble, did you meet custom-house men because you smuggled opium?

A. Never.

Q. Never got in trouble smuggling opium.

A. No.

Q. What did you get in trouble for?

A. Just smuggled Chinamen.

Q. How long have you been engaged in smuggling Chinamen?

A. About two years ago I got arrested.

Q. How long before that first time you started to smuggle Chinese?

A. I, no smuggle Chinamen. Me and another Chinaman on the train and they said we smuggle Chinamen.

Q. You pleaded guilty.

A. I got no money; cost $1000 for lawyer. No got so much money. My friend tell me better say guilty. I stayed in jail a long time. Pretty near one year.

Q. Did you ever learn any other place that the girl Ah Heung had been located, other than the hotel where she was found with you? A. No.

Q. Did you tell her anything about you being in trouble in Los Angeles and that neighborhood?

A. No. [42]

(Testimony of Ah Yoke.)

U. S. DEPARTMENT OF LABOR.

Immigration Service.

No. 12020/1589. Angel Island, Cal.,

September 7, 1915.

In re AH YOKE, *alias* BOW HEUNG, *alias* AH HEUNG, *alias* JANE DOE, Taken into Custody Sept. 1, 1915.

Examining Inspector—J. X. STRAND.

Interpreter—LEO G. DEAN.

Stenographer—L. E. DINKLAGE.

Testimony of Ah Yoke.

Alien sworn.

Q. What is your name?

A. My name is Ah Yoke.

Q. What is your family name?

A. I am not willing to give you my family name at the present time. I am waiting for my attorney's advice.

Q. How old are you?

A. I know my age but I won't tell you?

Q. Where were you born?

A. Born in this country.

Q. Have you any documentary evidence to support that statement? A. Not with me.

Q. Where were you born?

A. I don't wish to tell you just now where I was born.

Q. Is it not a fact that you were born in China?

A. No, in the United States.

(Testimony of Ah Yoke.)

Q. Were you ever on board the steamer "Manchuria" at any time?

A. I don't know that boat.

Q. Were you ever known under the name of Bow Heung? A. No.

Q. Were you ever known by the name of Gum Chi? A. No.

Q. Did you ever live in a building at 12 Portola Alley at any time? A. No, I never lived there.

Q. Where do you reside?

A. I am not going to give you that information yet.

Q. How long have you resided in the hotel where you were apprehended? A. Two nights.

Q. Are you married? A. No.

Q. How do you support yourself?

A. My father and mother support me. [43]

Q. Where are your parents?

A. I don't wish to state that just now.

Q. What are the names of your parents?

A. I don't wish to tell you about my father and mother. He knows all about my trouble.

Q. Who knows all about your trouble?

A. He knows that I am here—my father.

Q. How do you know that your father is aware that you are being detained here?

A. Because he is inquiring about me and people must have told him I was arrested.

Q. Have you made any trips to China? A. No.

Q. How long have you been acquainted with the Chinese man who was apprehended with you in a

(Testimony of Ah Yoke.)

hotel in Chinatown recently?

A. I don't know him. I was sleeping in the room. He was arrested outside of my room.

Q. Is it not a fact that he was apprehended on the fire escape immediately outside of the room where you were found? A. That I don't know.

Q. He stated that he had a certain room in that hotel engaged and that you came there to visit that room for the purpose of taking a bath. Is that statement correct? A. Yes, that is correct.

Q. Did you take a bath as he stated was the purpose of your coming?

A. That is not so. I did not go to his room to take a bath, but that room belonged to me and he came to my room to take the bath. After he took the bath he went away and then I went to bed and went to sleep and I don't know what became of him.

Q. What was the number of the room which you claim belonged to you?

A. I don't know the number of the room.

Q. Have you registered in that hotel? A. No.

Q. Had this man ever been in your room on any previous occasion? A. No.

Q. How did he gain access to your room on this particular occasion? [44]

A. The landlady told him about my room; it has a bathtub—that is how he came. There was no previous arrangement.

Q. Do you know the name of this person—this Chinese? A. No.

Q. He has given his name as Wong Him Shing.

(Testimony of Ah Yoke.)

A. That I don't know.

Q. You were brought in his presence the other day when he was being questioned and he identified you as a girl he had known as Ah Heung.

A. I never heard him address me by that name. He don't know me.

Q. He stated he had known you for at least several days; that you had visited him on other occasions; had been in there talking to him.

A. No, that is not so.

NOTE: This alien was taken to Miss Cameron's Mission the other day by Inspector Robinson of this Service and two of the girls under Miss Cameron's care, formerly inmates of houses of prostitution, identified this girl, one stating that she was Gum Chi, the other one stating that she was Bow Heung. Warrants of arrest have been issued for a certain Gum Chi with the *alias* Bow Heung, and it is my understanding these girls stated that the girl now under arrest was an inmate of a house of prostitution at 12 Portola Alley. If this information is correct it is evident that she is a girl reported to this office some time ago as having been smuggled into this country from the steamer "Manchuria." An investigation along that line is now being made inasmuch as the alien refuses to give any information concerning her nativity.

I hereby certify to the correctness of the foregoing transcript.

L. E. DINKLAGE,
Stenographer. [45]

(Testimony of Ah Yoke.)

U. S. DEPARTMENT OF LABOR.
Immigration Service.

No. 12020/1589 Angel Island, Cal.
September 20, 1915.

In re AH YOKE, *alias* BOW HEUNG, *alias* GUM CHI, *alias* WONG AH MUY, etc., Taken into Custody September 1, 1915.

Examining Inspector—J. X. STRAND.
Interpreter—LEE G. DEAN.
Stenographer—L. E. DINKLAGE.

Alien sworn.

Q. What is your name? A. Ah Yoke.

Q. What is your family name?

A. I don't know my family name.

Q. How old are you? A. 20.

Q. Were were you born?

A. I don't know; I was born in the United States.

Q. I will show you full face and profile photograph of Chinese girl in record #11266/32029, page 14 thereof, and ask you if you recognize the same.

A. I don't know those pictures.

Q. Is it not a fact that those photographs were taken of you at this station on or about October 10, 1912? A. I never been here before.

Q. Were you ever known under the name of Wong Ah Muy?

A. No, I never had that name. I never *same* from China.

Q. I will show you full face photograph which appears on page 20 of the record and ask you if you recognize that photograph.

(Testimony of Ah Yoke.)

A. I don't know her. (Same is photograph of applicant, Wong Ah Muy, who came on the "Shinyo Maru," October 7, 1912.)

Q. I will show you photograph of a Chinese man which appears on page 3 of the record and ask you if you recognize that photograph.

A. I don't know him.

Q. I will show you photograph on the same page with a Chinese girl directly below the one just shown you of the Chinese man, and ask you if you recognize that photograph.

A. I don't know her. (These photographs refer to the aforesaid Wong Ah Muy and her alleged husband, Lim Yuen, who arrived at this port on the same steamer [46] as the girl above mentioned, having ticket #32006.)

Q. Inasmuch as you claim nativity have you any documentary evidence to produce to support that statement?

A. I have no records or papers to show, but they are with my parents.

Q. What are the names of your parents?

A. My father has a name, but I will not give it to you.

Q. What is the name of your mother?

A. Her name is Lee Shee, but she is dead.

Q. Where did she die?

A. I was 4 or 5 years old.

Q. Where did she die? A. In this country.

Q. Have you any brothers or sisters?

A. None.

(Testimony of Ah Yoke.)

Q. Notwithstanding your claim to nativity, I am satisfied that you were not born in this country, but that you are the person represented in the photograph of the Chinese girl I have shown you on three different occasions in this record which I have before me. I received information from several sources that you came to this country three or four years ago as the wife of a native; that you were the wife of a Lim man, and with that information to work on I was able to locate the record which I am now referring to. The photographs in each instance of the Chinese girl clearly indicate that you are the person who did come to this country as the wife of a native, and as the wife of a certain Lim Yuen.

A. I don't care what you have found out. You got a mouth and I got a mouth and each one can say what they want.

Q. A warrant of arrest has been issued by the Acting Secretary of Labor covering a certain Jane Doe. This name was used for the occasion in asking for the warrant inasmuch as you refused to give your name when you were first brought to the station. This Jane Doe warrant sets forth that you are a prostitute and have been found practicing prostitution subsequent to your entry into the United States. In addition to referring to you as Jane Doe you will [47] also be referred to as Wong Ah Muy, the name under which I claim you came to this country, alien, native of Canton, China, in 1912, as the wife of a native.

A. I don't know what way you are conducting this case.

(Testimony of Ah Yoke.)

Q. You are now brought before me, an immigrant inspector, to give you an opportunity to show cause, if you have any, why you should not be deported in conformity with law.

A. I can give you no other reason except I was born here.

Q. You are further notified that you have the privilege of inspecting the warrant of arrest and all the evidence upon which it was issued.

A. I don't want to see it.

Q. You are further notified that you have the privilege of employing counsel. Do you wish to avail yourself of that privilege?

A. My case is taken care of by my father.

Q. Do you wish to employ counsel to represent you in any further hearing in this case?

A. I leave that to my father. He can hire an attorney for me.

Q. Your attorney, no doubt, will make the necessary arrangements for your release under bond in the sum of $1,000, that being permitted under the terms of the warrant, when we were satisfied as to your identity. A. All right.

I hereby certify to the correctness of the foregoing transcript.

L. E. DINKLAGE,
Stenographer. [48]

Affidavit of Chin Ah Yoke.

State of California,
City and County of San Francisco,—ss.

Chin Ah Yoke, being first duly sworn upon oath, according to law, doth depose and say:—

That she is a native born citizen of the United States, having been born at No. 708½ Commercial St., San Francisco, on or about the 23d day of March, 1896 (Kwong Suey 22–2–10), and that Chin Duck Quong is your affiant's father and that Lee Shee was your affiant's mother. That your affiant's mother died at the said family domicile at No. 708½ Commercial St. on about the 20th day of June, (K. S. 25–6–20), when your affiant was about four years of age. That the exact date of your affiant's birth and the date of the death of your affiant's mother are, of course, not within the personal recollection of your affiant, and is the result of the information given to your affiant by your affiant's said father many years preceding to the present time.

That after the death of your affiant's mother your affiant was taken care of by Ho Shee in the said building, at No. 708½ Commercial St., under the guidance and direction of affiant's father. That your affiant continued to reside at No. 708½ Commercial St. for many years thereafter with Ho Shee.

That your affiant has never been out of the United States, has always resided herein. That at the time of the arrest of your affiant in San Francisco on September 1st, she had never had any previous experience with the Immigration officials, but that ar-

rested at the same time with her was a Chinese man who claimed to have had experience with criminal matters, who advised and told your affiant that she should not give any information about herself, about who or what she was, until an attorney could some and see her and talk to her, and that this privilege would have to be accorded me, and it was for that reason, because I had no advice, and was [49] unable to communicate with others, and others could not communicate with me, that I refused to make any statement at all to the Immigration officials with respect to myself. That if I had been permitted counsel to advise me, or if my friends had been allowed to communicate with me, I would have given true, full and correct information about myself. That I was kept at the immigration station from the time of my apprehension on September 1st for a period of three weeks before released on custody, and during that time I was not permitted to see or interview anyone, nor was any attorney permitted to see me.

That the confronting with your affiant of the landing record of the case of the Chinese woman known as Wong Ah Muy, is correctly set forth in the record of the proceedings of September 20th, in so far as I am confronted with the record, but that I do not know the person described in the said record, and whose photograph is hereto attached, and while it may resemble my photograph it is not of myself, and I am not the Wong Ah Muy referred to. That I am Chin Ah Yoke. That I was born and raised in this country, and have never been absent therefrom.

That the photograph which is hereto annexed is of your affiant.

That your affiant submits herewith the affidavit of her father, Chin Duck Quong, the affidavit of Ho Shee who cared for and raised your affiant after the death of the mother of your affiant, the affidavit of Chin Shee who has known your affiant since the earliest recollection of your affiant, and also of Chin Pak, who has known your affiant since your affiant's earliest recollection.

CHIN (Chinese Characters) AH YOKE.

Subscribed and sworn to before me this 20 day of December, 1915.

(Seal) THOMAS S. BURNES,

Notary Public in and for the City and County of San Francisco, State of California.

(PHOTO ON ORIGINAL ONLY.)

Photograph of CHIN AH YOKE. [50]

Affidavit of Chin Duck Quong.

State of California,

City and County of San Francisco,—ss.

Chin Duck Quong, being first duly sworn upon oath, according to law, doth depose and say:

That he is a resident Chinese person lawfully domiciled within the United States, and that he has been such for many years last past.

That this affidavit is made by your affiant to facilitate in establishing the identity of your affiant's daughter Chin Ah Yoke, who was born on or about the 23d day of March, 1896 (K. S. 22–2–10) at No. 708½ Commercial Street, San Francisco, Cal. That

your affiant is her father, and that your affiant's wife Lee Shee was her mother. That she continued to and did reside with your affiant up until the time of the death of your affiant's said wife Le Shee. That your affiant's said wife died at her family domicile at No. 708½ Commercial St. on or about June 20th, 1900 (K. S. 5–20). That after the death of your affiant's said wife his said daughter Chin Ah Yoke so continued to reside in the same building, and was there cared for by a Chinese woman by the name of Ho Shee, and that she continued to reside with her, under the care and observation of your affiant, for a number of years thereafter. That your affiant's said daughter Chin Ah Yoke has never to the knowledge of your affiant been out of the United States, but has always continued to reside, and does now reside therein.

Your affiant further deposes and says that the said Chin Ah Yoke was recently taken into custody by the Immigration officials on a charge of being an alien Chinese woman, the claim being advanced that she entered the United States on the SS. "Shinyo Maru" on October 7th, 1912, under the name of Wong Ah Muy, as the wife of a citizen or a merchant. In this connection your affiant desires to depose and say that however much the photograph of this said Wong [51] Ah Muy may resemble his said daughter Chin Ah Yoke, that it is not a photograph of the said Chin Ah Yoke, and the said Wong Ah Muy is a person separate, different and apart from your affiant's said daughter who was taken into custody by the immigration officials as aforesaid. In this connection your

affiant alleges that a mistake in identity has been made by assuming that your affiant's said daughter is the said Wong Ah Muy.

That within the last few years your affiant's said daughter Chin Ah Yoke has not been entirely under the control of your affiant. That your affiant is a laboring man and has his daily duties to perform, and since his daughter Chin Ah Yoke has reached an adult age she has lived separate and apart from your affiant, and your affiant has not had an opportunity to daily observe her movements as was his custom and habit during her younger years, and that your affiant did not know of her arrest by the immigration authorities, and did not learn thereof until sometime later.

That the photograph annexed to the affidavit of the said Chin Ah Yoke, hereto attached, is of the said Chin Ah Yoke, affiant's daughter.

CHIN (Chinese Characters) DUCK QUONG.

Subscribed and sworn to before me this 20 day of December, 1915.

(Seal) THOMAS S. BURNES,
Notary Public, in and for the City and County of San Francisco, State of California. [52]

State of California,

Affidavit of Ho Shee.

City and County of San Francisco,—ss.

Ho Shee, being first duly sworn upon oath, doth depose according to law, *doth depose* and say:

That affiant is a resident Chinese person lawfully domiciled within the United States. That your affi-

ant is personally acquainted with Chin Ah Yoke who was recently arrested and taken into custody on the charge of being an alien Chinese woman, and that your affiant has known the said Chin Ah Yoke since her birth. That Chin Ah Yoke's parents are respectively Chin Duck Quong, her father and Lee Shee, her mother. That she was born at No. 708½ Commercial Street, San Francisco. That your affiant resided in the said building at the said time, and knew the said family living there, and knew of the birth of their child, and saw them almost daily until the *daughter* of the mother, Lee Shee, which occurred about the middle of the 26th year of Kwong Suey, and that thereafter the said Chin Ah Yoke was placed in the care and custody of your affiant, who cared for and raised her under the supervision of her father. That the said Chin Ah Yoke continued to reside with your affiant until she became an adult. That your affiant has seen her continuously since her younger years, and frequently since, and knows that the said Chin Ah Yoke is a native born citizen of the United States.

That your affiant heard of the arrest of the said Chin Ah Yoke by the Immigration authorities, and endeavored to locate her father, so that he might send for her, but she was unable to find his whereabouts for sometime thereafter.

In conclusion your affiant submits that the said Chin Ah Yoke is not an alien, but is a native born citizen of the United States as herein set forth. [53]

That the photograph attached to the affidavit of the

said Chin Ah Yoke, hereto annexed, is of the said Chin Ah Yoke.

her
HO X SHEE.
mark

Witnesses to mark:

THOMAS S. BURNES.
CHIN PAK.

Subscribed and sworn to before me this 20 day of December, 1915.

[Seal] THOMAS S. BURNES,
Notary Public, in and for the City and Coutny of San Francisco, State of California. [54]

Affidavit of Chin Shee.

State of California,
City and County of San Francisco,—ss.

Chin Shee, being first duly sworn upon oath, according to law, doth depose and say:—

That your affiant is a resident Chinese person lawfully domiciled within the United States.

That your affiant is personally well acquainted with Chin Ah Yoke who was arrested by the Immigration authorities in this city on or about the 1st day of September, 1915. That your affiant knows the said Chin Ah Yoke to be a native born citizen of the United States, her father being Chin Duck Quong, and her mother having been Lee Shee. That the said Chin Ah Yoke was born at the then family domicile at No. 708½ Commercial Street, San Francisco, Cal., and that she was born during the first few months of the 22d year of Kwong Suey, and

that she continued to reside with her parents from the time of her birth until the death of her mother, which occurred at their said residence about the middle of the 26th year of Kwong Suey, and that thereafter the said Chin Ah Yoke was placed in custody, and was cared for by Ho Shee, who lived in the same building at No. 708½ Commercial St., but that while in the care and custody of Ho Shee the said Chin Ah Yoke was under the control and custody of her father. The said Chin Ah Yoke continued to reside with the said Ho Shee for many years thereafter. That your affiant has known the said Chin Ah Yoke, and has seen her at frequent intervals, and knows that she is a native-born citizen of the United States.

Your affiant is further advised that there has been an attempted identification of the said Chin Ah Yoke as a Chinese woman by the name of Wong Ah Muy, who it is claimed entered the United States some three years ago. In this connection your affiant alleges that the said Chin Ah Yoke is not the said Wong Ah Muy, [55] and your affiant believes that a mistake in identification has been made.

That the photograph attached to the affidavit of the said Chin Ah Yoke hereto annexed is of the said Chin Ah Yoke.

her
CHIN X SHEE,
mark

Witnesses to mark:

THOMAS S. BURNES,
CHIN PAK.

Subscribed and sworn to before me this 20 day of December, 1915.

[Seal] THOMAS S. BURNES,
Notary Public, in and for the City and County of San Francisco, State of California. **[56]**

Affidavit of Chin Pak.

State of California,
City and County of San Francisco,—ss.

Chin Pak, being first duly sworn upon oath, according to law, doth depose and say:

That affiant is a resident Chinese person lawfully domiciled within the United States. That affiant is personally well acquainted with Chin Ah Yoke who was arrested by the Immigration authorities about the 1st day of September, 1915.

That the said Chin Ah Yoke has been known to affiant since she was two or three years of age. That when your affiant first learned of her it was through his acquaintance with her parents Chin Duck Quong and his wife Lee Shee, who then resided at No. 708½ Commercial St., where your affiant was informed by the said Chin Duck Quong and Lee Shee that their child had been born.

That your affiant has seen the said Chin Ah Yoke at frequent intervals since the time of her birth up to the present time, and is in a position to and positively does identify the said Chin Ah Yoke as a native born citizen of the United States.

Your affiant having been advised that the Immigration authorities have attempted to identify the said Chin Ah Yoke as an alien Chinese woman by the name of Wong Ah May, who it is *claimed the*

United States about three years ago, your affiant desires to depose and say that he believes a mistake in identity has been made as the said Chin Ah Yoke was born, reared and raised in the United States, and within the knowledge of your affiant the said Chin Ah Yoke has at no time been out of the United States.

That the photograph annexed to the affidavit of the said Chin Ah Yoke is of the said Chin Ah Yoke.

CHIN PAK.

Subscribed and sworn to before me this 20 day of December, 1915.

[Seal] THOMAS S. BURNES,

Notary Public, in and for the City and County of San Francisco, State of California. [57]

In re: AH YOKE, Whose True Name is CHIN AH YOKE, Arrested September 1st, 1915, Under Departmental Warrant No. (S. F.) 12020/1589 Department No. 54012/116.

In accordance with the provisions of the Immigration Rules and Regulations there is submitted herewith the testimony, affidavits and counter-showing made upon behalf of Chin Ah Yoke, arrested herein as Jane Doe.

PROTESTS AND EXCEPTIONS.

The Immigration Rules and Regulations provide that the Protest and Exceptions should not encumber the record, but should be embodied in a separate written communication. We desire to protest against the taking of the detained into custody on the 1st day of September, 1915, and held incommunicado, and not granting her the right of counsel,

or the right of communicating with her friends, or having her friends or relatives communicate with her, from the 1st of September to and including the 20th day of September, and by said action preventing the detained from being advised by her relatives, friends and legal adviser of the reason for her having been taken into custody, and what her rights and privileges were in the premises, so that she acting upon said advice could have given all the information desired of her in the proceeding pending against her.

We desire further to protest against the incorporation in the record herein of the testimony taken upon the 1st day of September, 1915, and on the 2d day of September, 1915, from Wong Him Sing, otherwise known as Wong Ngee Ting, on the ground that the said testimony was taken in the proceeding contemplated against the said Chin Ah Yoke, and that the detained was at said hearing not permitted to be present with her counsel, so that she might question the said witness with respect to the subject matter of [58] his evidence detrimental to the said detained, and it is now desired and requested that the said Wong Him Sing be recalled as a witness, so that he may be examined or cross-examined at the instance of the said Chin Ah Yoke, and that now the right of attorney having been accorded her she may submit evidence on her own behalf from said witness.

Request is hereby made that the statements made by "two of the girls under Miss Cameron's care," wherein this Chin Ah Yoke was identified as a cer-

tain Gum Chi, and further as a certain Bow Heung, may be presented and filed with the record herein, so that they may be inspected by the said detained and her counsel. It is also desired that the warrant of arrest for the certain Gum Chi alias Bow Heung be also presented for the inspection of the said Chin Ah Yoke and her counsel. The said Chin Ah Yoke in furtherance of the above and foregoing request desires to state that if the said requests are not complied with she desires to protest at the said refusal to so comply with her said request, and to protest the action of the officer before whom this hearing was conducted.

The said Chin Ah Yoke does further desire to protest against the said proceeding on the ground that she is a native born citizen of the United States, and that there is no evidence of her being other than a native-born citizen of the United States, and that the said proceeding herein is for said reason null and void and in violation of the constitutional rights and liberties of such native born citizen of the United States.

Respectfully submitted,

GEO. A. McGOWAN,

Attorney for Chin Ah Yoke. [59]

Affidavit of Donaldina Cameron.

COPY.

THE WOMAN'S OCCIDENTAL BOARD
of Foreign Missions
of the
Presbyterian Church
920 Sacramento Street.

San Francisco, Jan. 4, 1916.

Donaldina Cameron, being first duly sworn, deposes and says that on or about the first part of August, 1912, she entered the building known as the Mun Wing Hotel, situated on the north side of Clay Street, below Stockton Street, in the city and county of San Francisco, and rescued from a room in said hotel a young Chinese slave girl named Howe Seen, who was awarded to the custody of the Presbyterian Mission Home by Judge Murasky. The Chinaman in whose custody she was found at the time of her rescue being placed under arrest. The hotel above named was at that time and has subsequently been used as a rendezvous for slave girls and their owners.

(Sgd.) DONALDINA CAMERON.

Subscribed and sworn to before me at San Francisco, Calif., Jan. 4, 1916.

(Sgd.) JOHN A. ROBINSON,
Immigrant Inspector. **[60]**

Certificate of Immigrant Inspector Re Mon Hing Hotel.

U. S. DEPARTMENT OF LABOR.
Immigration Service.

12020/1589. Office of the Commissioner,
San Francisco, Cal.
January 5, 1916.

This is to certify that I have known the Mon Ming Hotel situated at 868 Clay Street, San Francisco, Calif., as a rendezvous for Chinese prostitutes and their consorts for the past three years or more.

JPL. JOHN A. ROBINSON,
Immigrant Inspector. [61]

Affidavit of Immigrant Inspector Re Wong Ah Mui.

12020/15–89.

January 5th, 1915.

This is to certify that I received information from a Chinese source that the woman under arrest believed by this office to be Wong Ah Mui and taken from the Mon Ming Hotel in company with a certain Chinese by the name of Wong Him Sing on the morning of the September 1st last, came to this country a few years ago as the wife of a Lim Man of Berkeley, California; that she was a prostitute and has pimp in San Francisco named Chim Pak—that the man who brought her to this country had returned to China.

Respectfully,
JOHN A. ROBINSON,
Inspector. [62]

U. S. DEPARTMENT OF LABOR.
Immigration Service.
Office of the Commissioner.
San Francisco, Cal.
January 8, 1916.

Memorandum for the Commissioner.

In re JANE DOE, *alias* WONG AH MUI, 12020/1589.

This person was found in a room of the Mon Ming Hotel, Chinatown of San Francisco, in company with a Chinese man who stated that she came to his room for the purpose of taking a "bath." Both were brought to this station, and it developed that the man was a native of this country, and he was accordingly released. The girl refused to make any statement other than to claim that she also was a native of this country; her demeanor, however, evidently indicated that she is of the prostitute class. Information had been conveyed to me from several sources after her arrest that she was a prostitute and that she came to this country three or four years ago as the wife of a "Lim" man, a laundryman of Berkeley who recently departed for China, and that she had a pimp known as Chin Pok. Inspector Robinson received similar information (see his affidavit).

I accordingly searched the book of arrivals in the Chinese Division covering the period in question, and finally located the record of Lim Yuen, 12017/5546, and from this record traced that of Wong Ah Mui (record No. 11266/32029, both herewith as exhibits), and from the photograph of this applicant I readily identified her as the girl now under arrest; a com-

parison of the enlarged photographs 3 and 4, taken of the girl under arrest, with the enlargements of the photographs 1 and 2 taken of the girl who was admitted, shows conclusively that they represent one and the same person— [63] the pit at the inner corner of right eyebrow and on left cheek demonstrate this.

Miss Cameron and Inspector Robinson give the Mon Ming Hotel the reputation of being a house of prostitution. I recommend that a warrant of deportation issue.

(Sgd.) J. X. STRAND,
Inspector in Charge, Immigration Division.

JXS–WDS.

[Endorsed]: No. 16,016. U. S. District Court, Northern District of California, First Division. In the Matter of Chin Ah Yoke, on Habeas Corpus. Respts. Exhibit "A." Presented in open court and filed Apr. 29, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [64]

In the District Court of the United States, in and for the Northern District of the State of California, First Division.

No. 16,016.

In the Matter of CHIN AH YOKE, *alias* JANE DOE, on Habeas Corpus.

Order Extending Time to August 23, 1916, to File Record and Docket Cause.

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the

petitioner and appellant herein, it is hereby ordered that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, may be and the same is hereby extended for the period of thirty (30) days from and after the date hereof.

Done in open court this 24th day of July, A. D. 1916.

WM. W. MORROW,

Judge United States Circuit Court of Appeals, for the Ninth Circuit.

Service of the within Order and receipt of a copy thereof is hereby admitted this 24th day of July, A. D. 1916, at San Francisco, Cal.

JOHN W. PRESTON,

U. S. Atty.

[Endorsed]: Filed Jul. 24, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[65]**

In the District Court of the United States, in and for the Northern District of the State of California, Southern Division, Div. No. One.

No. 16,016.

In the Matter of CHIN AH YOKE, *alias* JANE DOE, on Habeas Corpus.

Order Extending Time to September 7, 1916, to File Record and Docket Cause.

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the petitioner and appellant herein, it is hereby ordered

that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, may be and the same is hereby extended for the period of fifteen days from and after the date hereof.

Done in open court this 23d day of August, A. D. 1916.

M. T. DOOLING,
United States District Judge, Now Presiding in the Above-entitled Court.

The foregoing extension, which is being made for the purpose of completing the record, is hereto consented to.

JNO. W. PRESTON,
United States Attorney.

Due service and receipt of a copy of the within order is hereby admitted this 23d day of August, 1916.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California, Attorney for Respondent.

[Endorsed]: Filed Aug. 23, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[66]**

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, W. B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 66 pages, numbered from 1 to 66, inclusive, contain a full,

true, and correct transcript of certain records and proceedings, in the Matter of Chin Ah Yoke, etc., on Habeas Corpus, No. 16,016, as the same now remain on file and of record in this office; said Transcript having been prepared pursuant to and in accordance with the "Praecipe for Transcript on Appeal" (copy of which is embodied in this transcript), and the instructions of Geo. A. McGowan, Esq., Attorney for Petitioner and Appellant herein.

I further certify that the cost for preparing and certifying the foregoing Transcript on Appeal is the sum of thirty dollars and seventy cents ($30.70), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal, issued herein, page 68.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of August, A. D. 1916.

[Seal] W. B. MALING,
Clerk.
C. W. Calbreath,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Canceled 8/30/16. C. W. C.] **[67]**

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to Hon. EDWARD WHITE, Commissioner of Immigration for the Port of San Francisco and to His Attorney John W. Preston, Esq., United States Attorney for the Northern District of California, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, First Division, wherein Chin Ah Yoke, *alias* Jane Doe, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, First Division, this 23d day of June, A D. 1916.

M. T. DOOLING,
United States District Judge. **[68]**

Service of the within Citation and receipt of a copy thereof is hereby admitted this 24th day of June, 1916, at San Francisco, Cal.

JNO. W. PRESTON,
U. S. Attorney.

Copy of the within Citation on Appeal is lodged with the clerk of this court this 24th day of June, A. D. 1916. In witness whereof, I have hereunto set my official hand and seal.

W. B. MALING,
Clerk.
By C. W. Calbreath,
Deputy.

[Endorsed]: No. 16,016. United States District Court for the Northern District of California, First Division. Chin Ah Yoke, *alias* Jane Doe, Appellant, vs. Edward White, Commissioner of Immigration, Port of San Francisco. Citation on Appeal. Filed Jun. 23, 1916. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk.

[Endorsed]: No. 2859. United States Circuit Court of Appeals for the Ninth Circuit. Chin Ah Yoke, *alias* Jane Doe, Appellant, vs. Edward White, Commissioner of Immigration for the Port of San Francisco. In the Matter of Chin Ah Yoke, *alias* Jane Doe, on Habeas Corpus, Appellee. Transcript of Record. Upon Appeal from the United States

District Court for the Northern District of California, First Division.

Filed September 7, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 2859

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHIN AH YOKE, alias JANE DOE,
Appellant,

vs.

EDWARD WHITE, Commissioner of Immigration for the Port of San Francisco,

In the Matter of CHIN AH YOKE, alias JANE DOE on Habeas Corpus,
Appellee.

Brief for Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FIRST DIVISION.

GEO. A. McGOWAN,
Attorney for Appellant.
Bank of Italy Building,
San Francisco, California.

Filed
MAR 19 1917
Frank D. Monckton,
Clerk

Filed this.....day of March, 1917.
Frank D. Monckton, Clerk.

By.....Deputy Clerk.

PROGRESS PRINTING CO. 220 SIXTH ST., S. F.

No. 2859

United States
Circuit Court of Appeals

For the Ninth Circuit.

CHIN AH YOKE, alias JANE DOE,
Appellant,

vs.

EDWARD WHITE, Commissioner of Immigration for the Port of San Francisco,

In the Matter of CHIN AH YOKE, alias JANE DOE on Habeas Corpus,
Appellee.

Brief for Appellant.

STATEMENT OF THE CASE.

This case comes upon appeal before this court from the judgment of the District Court in denying the petition for a writ of Habeas Corpus wherein it was sought to have the lower court set aside the warrant of deportation against the appellant herein, issued by the Secretary of Labor, wherein he charges that the appellant is an alien who has been found practicing prostitution since her entry into the United States, while the appellant claims that she is not an

alien but is a native-born citizen of the United States and that she has always resided therein and has never absented herself therefrom, and hence the Secretary of Labor is without jurisdiction over her.

It appears from the record that on the morning of September 1st, 1915, this appellant, Chin Ah Yoke, was taken into custody, together with a Chinese man, Wong Him Sing, in whose company she was practically found, by a raiding party of police officers, Mission representatives, and an Immigration officer, in the Mon Ming Hotel, a Chinese Hostelry in the Chinatown District of San Francisco.

A telegram was sent by the Commissioner of Immigration at San Francisco to the Secretary of Labor at Washington, requesting the issuance of a warrant of arrest against this appellant under the name of Jane Doe, charging her as an alien who had landed at an unknown port, on or about the 1st day of July, 1915, and that she was a prostitute and had been found practicing prostitution subsequent to her entry into the United States. The warrant was issued as requested on September 2nd, 1915 (Tr. 31-32.)

The formal application for the said warrant of arrest is in part as follows:

(1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth the facts within the knowledge of the informants.)

Alien found in compromising surroundings with a

man. Both detained. Man later released when landing was verified, as son of Native. Man stated to Inspector Robinson that woman was a prostitute. Alien as yet refuses to talk. It is believed that she may be Gum Chi, *alias* Bow Heung, number 53210/76, dated June 17, 1911.

(2) The present location and occupation of above-named alien are as follows: At this Station.

After the apprehension of the appellant and Wong Him Sing, on September 1, 1915, they were taken together from San Francisco to the Immigration station at Angel Island. It appears from the affidavit of appellant "That at the time of the arrest of your affiant in San Francisco on September 1st, she had never had any previous experience with the Immigration officials, but that arrested at the same time with her was a Chinese man who claimed to have had experience with criminal matters, who advised and told your affiant that she should not give any information about herself, about who or what she was, until an attorney could come and see her and talk to her, and that this privilege would have to be accorded me."

Upon arriving at the Immigration Station Wong Him Sing was subjected to an examination (Tr. 35-43) in which he speaks of the appellant having visited his room and denies any immoral relations, though admits that she had previously visited his room. With respect to his own *experience with criminal matters* the following appears. (Tr. 40-41.)

"Q. Did you ever have any difficulty with

the police authorities in Los Angeles? A. Yes.

Q. What was it?

A. There were some Chinese smuggled from Mexico and they went into my restaurant in Los Angeles for hiding, and afterward I accompanied them on an auto stage. I was in the same stage to go to some suburb of Los Angeles and I was taken in custody with the crowd and I found that I had no money at that time and pleaded guilty and I was sentenced to ten months in prison for that trouble.

Q. Did you serve your time? A. Yes.

Q. In the city prison, Los Angeles? A. Yes.

Q. When were you released?

A. First month of this year (about February)."

and again in his examination on the following day, September 2nd, 1915, the following appears:

(Tr. 46)

"Q. Were you ever in Calexico?

A. Yes, I got pinched once there.

Q. What was the name of your restaurant there?

A. Calexico Cafe."

(Tr. 47)

"Q. Before when you have trouble, did you meet custom-house men because you smuggled opium?

A. Never.

Q. Never got in trouble smuggling opium?

A. No.

Q. What did you get in trouble for?

A. Just smuggled Chinamen.

Q. How long have you been engaged in smuggling Chinamen?

A. About two years ago I got arrested.

Q. How long before that first time you started to smuggle Chinese?

A. I, no smuggled Chinamen. Me and another Chinaman on the train and they said we smuggle Chinamen.

Q. You pleaded guilty.

A. I got no money; cost $1000 for lawyer. No got so much money. My friend tell me better say guilty. I stayed in jail long time. Pretty near one year."

At the conclusion of the examination of Wong Him Sing this appellant was brought before the Immigration Inspector and he attempted to conduct an examination of her. To appreciate what took place at this examination let us revert back to the advice given the appellant by Wong Him Sing who had had experience with criminal matters (Tr. 57)

> "That she should not give any information about herself or who or what she was until an attorney could come and see her and talk to her and that this privilege would have to be accorded * * * * "

and let us further note how in her stress she acted upon the advice given her (Tr. 57)

"It was for that reason, because I had no advice, and was unable to communicate with others, and others could not communicate with me, that I refused to make any statement at all to the Immigration officials with respect to myself. That if I had been permitted counsel to advise me, or if my friends had been allowed to communicate with me, I would have given true, full and correct information about myself. That I was kept at the Immigration Station from the time of my apprehension on September 1st for a period of three weeks before released on custody, and during that time I was not permitted to see or interview anyone, nor was any attorney permitted to see me."

The attempted examination of appellant follows:

(Tr. 44)

"Q. What is your name?

A. I don't want to tell you my name.

Q. You are informed that your refusal to divulge your real name, or answer any questions which may be asked of you at this time, will only serve to prolong your detention and the ultimate bringing to a close of your case. (No answer.

Q. Where were you born? A. (No answer.)

Q. How old are you? A. Don't know.

Q. When did you come to the United States?

A. I was born in the United States.

Q. Have you any documentary evidence to

show that?

A. I have not here. It is is with my attorneys.

Q. Where are your parents?

A. I don't want to tell you anything about them.

Q. How do you expect to leave this station unless you furnish us (39) with information to satisfy us that you are entitled to remain in the United States, you being of the Chinese race?

A. Don't care; I don't want to tell you anything.

Q. Do you realize that you will be held at this station until you make the proper statement to show your right to be in the United States?

A. I don't see why you could deport me, or why I cannot stay in this country.

Q. If you show us the evidence or give us the information to substantiate your claim that you are native born, this office has no reason to detain you any longer. (Refuses to answer.)

On September 2nd, 1915, Wong Him Sing was reexamined as to the identity of the appellant:

(Tr. 45)

"Q. I will ask you again what is her family name?

A. I don't know her family name.

Q. Did you ever hear her referred to as Gum Chi? A. I never heard that.

Q. Did you ever hear her referred to as Bow Heung? A. I don't know that.

Q. You told me you were going to tell me the truth.

A. I don't know.

Wong Him Sing was released and permitted to go his way at the conclusion of this examination.

On September 4th, 1915, the formal application for the warrant of arrest was made out and contained the following:

(Tr. 33)

"Alien found in compromising surroundings with a man. Both detained. Man later released when landing was verified, as son of Native. Man stated to Inspector Robinson that woman was a prostitute. Alien as yet refused to talk. It is believed that she may be Gum Chi, alias Bow Heung, warrant numbered 53210-76, dated June 17, 1911."

At some time between September 1st and 6th, the appellant was taken to the Presbyterian Mission, and on September 7th was noted what there transpired.

(Tr. 51)

"NOTE: This alien was taken to Miss Cameron's Mission the other day by Inspector Robinson of this Service and two of the girls under Miss Cameron's care, formerly inmates of houses of prostitution, identified this girl, one stating that she was Gum Chi, the other one stating that she was Bow Heung. Warrants of arrest have been issued for a certain Gum Chi with the *alias* Bow Heung, and it is my under-

standing these girls stated that the girl now under arrest was an inmate of a house of prostitution at 12 Portola Alley. If this information is correct it is evident that she is a girl reported to this office some time ago as having been smuggled into this country from the steamer 'Manchuria.' An investigation along that line is now being made inasmuch as the alien refuses to give any information concerning her nativity."

On September 7th the appellant was again re-examined, and she still adhered in the main to the advice given her by Wong Him Sing (Tr. 56-57) and refused to give information concerning herself, though she did in substance give considerable more information about herself than upon her first examination.

(Tr. 48-49)

"Q. What is your name?

A. My name is Ah Yoke.

Q. What is your family name?

A. I am not willing to give you my family name at the present time. I am waiting for my attorney's advice.

Q. How old are you?

A. I know my age but I won't tell you.

Q. Where were you born?

A. Born in this country.

Q. Have you any documentary evidence to support that statement? A. Not with me.

Q. Where were you born?

A. I don't wish to tell you just now where I

was born.

Q. Is it not a fact that you were born in China?

A. No, in the United States.

Q. Were you ever on board the steamer 'Manchuria' at any time?

A. I don't know that boat.

Q. Were you ever known under the name of Bow Heung? A. No.

Q. Were you ever known by the name of Gum Chi? A. No.

Q. Did you ever live in a building at 12 Portola Alley at any time? A. No, I never lived there.

Q. Where do you reside?

A. I am not going to give you that information yet.

Q. How long have you resided in the hotel where you were apprehended? A. Two nights.

Q. Are you married? A. No.

Q. How do you support yourself?

A. My father and mother support me. (43)

Q. Where are your parents?

A. I don't wish to state that just now.

Q. What are the names of your parents?

A. I don't wish to tell you about my father and mother. He knows all about my trouble.

Q. Who knows all about your trouble?

A. He knows that I am here—my father.

Q. How do you know that your father is aware that you are being detained here?

A. Because he is inquiring about me and people must have told him I was arrested.

Q. Have you made any trips to China? A. No.

The appellant was from September 1st, 1915, held in custody incommunicado, and the right of counsel withheld until the conclusion of the examination held on September 20, 1915, wherein the appellant testified about herself as follows:

(Tr. 52)

"Q. What is your name? A. Ah Yoke.

Q. What is your family name?

A. I don't know my family name.

Q. How old are you? A. 20.

Q. Where were you born?

A. I don't know; I was born in the United States.

(Tr. 53)

"Q. Inasmuch as you claim nativity have you any documentary evidence to produce to support that statement?

A. I have no records or papers to show, but they are with my parents.

Q. What are the names of your parents?

A. My father has a name, but I will not give it to you.

Q. What is the name of your mother?

A. Her name is Lee Shee, but she is dead.

Q. Where did she die?

A. I was 4 or 5 years old.

Q. Where did she die? A. In this country.

Q. Have you any brothers or sisters?

A. None."

(Tr. 55)

"Q. You are now brought before me, an immigrant inspector, to give you an opportunity to show cause, if you have any, why you should not be deported in conformity with law.

A. I can give you no other reason except I was born here.

Q. You are further notified that you have the privilege of inspecting the warrant of arrest and all the evidence upon which it was issued.

A. I don't want to see it.

Q. You are further notified that you have the privilege of employing counsel. Do you wish to avail yourself of that privilege?

A. My case is taken care of by my father.

Q. Dou you wish to employ counsel to represent you in any further hearing in this case?

A. I leave that to my father. He can hire an attorney for me.

Q. Your attorney, no doubt, will make the necessary arrangements for your release under bond in the sum of $1,000, that being permitted under the terms of the warrant, when we were satisfied as to your identity. A. All right."

At this hearing on September 20th, 1915, the appellant was confronted with a landing record of a Chinese woman by the name of Wong Ah Muy, who had arrived at the port of San Francisco on the Shin-

yo Maru, October 7th, 1912, and had been permitted to enter the United States as the wife of a native born citizen of the United States. The appellant claims she is not that person and the Immigration authorities claimed from that hearing on September 20th, 1915, that she was. (Tr. 52-53-54.)

This appellant was arrested on September 1st, 1915, and was held in close custody, incommunicado in fact, and without the right of counsel from that day on until after the hearing on September 20th, 1915, had concluded.

Upon being given an opportunity to present her defense to the charges brought against her the appellant caused to be submitted her affidavit (Tr. 56-57-58), the affidavit of Chin Duck Quong, her father, (Tr. 58-59-60*), the affidavit of Ho Shee, the Chinese lady who had cared for her after the death of her mother, and had raised her (Tr. 60-61-62), the affidavit of Chin Shee, a Chinese lady who had known the affiant since her birth in this country (Tr. 62-63) and lastly the affidavit of Chin Pok, who had known the affiant here in this country since she was a baby 2 or 3 years of age (Tr. 64-65). The foregoing affidavits attest the birth of the appellant within the United States and her subsequent life therein showing it to be impossible that she could be the Wong Ah Muy, as contended by the Immigration authorities, and claiming and contending that a mistake of identification had been made.

The communication submitting the foregoing affidavits, all of which were sworn to on December 20,

1915, is as follows:

(Tr. 65-66-67)

Department No. 54012-116.

"In accordance with the provisions of the Immigration Rules and Regulations there is submitted herewith the testimony, affidavits and counter-showing made upon behalf of Chin Ah Yoke, arrested herein as Jane Doe.'

PROTESTS AND EXCEPTIONS.

The Immigration Rules and Regulations provide that the Protest and Exceptions should not encumber the record, but should be embodied in a separate written communication. We desire to protest against the taking of the detained into custody on the 1st day of September, 1915, and held incommunicado, and not granting her the right of counsel, or the right of communicating with her friends, or having her friends or relatives communicate with her, from the 1st of September to and including the 20th day of September, and by said action preventing the detained from being advised by her relatives, friends and legal adviser of the reason for her having been taken into custody, and what her rights and privileges were in the premises, so that she acting upon said advice could have given all the information desired of her in the proceeding pending against her.

We desire further to protest against the incorporation in the record herein of the testimony

taken upon the 1st day of September, 1915, and on the 2d day of September, 1915, from Wong Him Sing, otherwise known as Wong Ngee Ting, on the ground that the said testimony was taken in the proceeding contemplated against the said Chin Ah Yoke, and that the detained was at said hearing not permitted to be present with her counsel, so that she might question the said witness with respect to the subject matter of (58) his evidence detrimental to the said detained, and it is now desired and requested that the said Wong Him Sing be recalled as a witness, so that he may be examined or cross-examined at the instance of the said Chin Ah Yoke, and that now the right of attorney having been accorded her she may submit evidence on her own behalf from said witness.

Request is hereby made that the statements made by 'two of the girls under Miss Cameron's care,' wherein this Chin Ah Yoke was identified as a certain Gum Chi, and further as a certain Bow Heung, may be presented and filed with the record herein, so that they may be inspected by the said detained and her counsel. It is also desired that the warrant of arrest for the certain Gum Chi alias Bow Heung be also presented for the inspection of the said Chin Ah Yoke and her counsel. The said Chin Ah Yoke in furtherance of the above and foregoing request desires to state that if the said requests are not complied with she desires to protest at the said refusal to

so comply with her said request, and to protest the action of the officer before whom this hearing was conducted.

The said Chin Ah Yoke does further desire to protest against the said proceeding on the ground that she is a native born citizen of the United States, and that there is no evidence of her being other than a native-born citizen of the United States, and that the said proceeding herein is for said reason null and void and in violation of the constitutional rights and liberties of such native born citizen of the United States.

Respectfully submitted,

GEO. A. McGOWAN,

Attorney for Chin Ah Yoke." (59)

On January 4, 1916, an affidavit of Donaldina Cameron was presented by the government to show that the Mon Ming Hotel had "been used as a rendezvous for slave girls and their owners." (Tr. 68)

On January 5, 1916, Immigrant Inspector John A. Robinson filed a certificate attesting that

(Tr. 69)

"This is to certify that I have known the Mon Ming Hotel situated at 868 Clay Street, San Francisco, Calif., as a rendezvous for Chinese prostitutes and their consorts for the past three years or more."

On the same day the said John A. Robinson submitted a report certifying that he had heard a report

from a Chinese source that the woman arrested at the Mon Ming Hotel on September 1st last, was Wong Ah Mui, who had come "to this country a few years ago as the wife of Lim Mar of Berkeley, California; that she was a prostitute and had a pimp named Chim Pak—that the man who brought her to this country had returned to China." (Tr. 69.)

On January 8th, 1916, Inspector in charge of the Immigration Division J. X. Strand, submitted his memorandum to the Commissioner (Tr. 70)

On March 17th, 1916, the Acting Commissioner answers the protests and exceptions of the appellant as follows:

(Tr. 30-31)

> "In connection therewith it is noted that you filed a brief of exceptions, wherein you protest against the admission of the testimony of Wong Him Sing on the ground that the detained was not confronted by said witness and was not accorded the privilege of cross-examination by counsel, as a result of which you request the recall of that witness. In reply thereto you are advised that it is the understanding of this office that said witness lives in Yuma, Arizona, and that he was only in this city on a visit at the time the defendant was taken into custody; and that this office has no authority or process by which his attendance as a witness could be compelled, or funds from which to defray the expenses incident thereto. It is unnecessary to state, however, that it is the desire of this office

to hear all witnesses in the alien's behalf, and that if you wish to introduce this man as your witness, and have any means by which to accomplish that purpose, an opportunity will be accorded for the taking of such additional testimony. With regard to your further request that there be made part of the record (28) statements of girls in a Presbyterian Mission who identified the defendant as Gum Chi or Bow Heung, and that there be produced for your inspection the warrant of arrest for the last-mentioned person, you are advised that it does not appear from the record that those statements were recorded, and the first part of your request cannot therefore be complied with. You are informed, however, that these references in the record to Gum Chi and Bow Heung are entirely immaterial, and the introduction of the warrant of arrest in that case cannot therefore serve any useful purpose.

Also on March 17th, 1916, the Acting Commissioner forwarded the record to the Commissioner General of Immigration at Washington (Tr. 26-27-28-29), and referring therein to the protests and exceptions of appellant states as follows:

(Tr. 28-29)

It will be noted that the attorney of record has protested and excepted to the fact that the alien was held incommunicado from the date of her arrest until counsel was permitted to enter the

proceedings; to the admission of the testimony of Wong Him Sing (taken into custody in company with the alien) on the ground (26) that the alien was not present with counsel; and to the fact that the privilege of cross-examination was not accorded; and has requested that the latter witness be recalled for the defense. It is believed that the action of this office was in no way prejudicial to the interest of the alien, and was entirely in accord with the regulations. It has assumed the position, and has so advised the attorney, that the further testimony of Wong Him Sing will be taken if his production is secured by counsel, this office having no power or process by which to compel his attendance as a witness, nor funds from which to defray the expense incident thereto. As to the right of cross-examination, it would appear that adjudicated cases hold that such privilege cannot be claimed as a right. The attorney's demand that testimony and warrants referring to certain Gum Chi or Bow Heung be made a part of the record has been denied, first on the ground that the statements referred to were not made of record, and secondly, because they were subsequently shown to be immaterial."

On April 12th, 1916, the Secretary of Labor issued his warrant of deportation against appellant. (Tr. 25-26)

The questions presented in this matter are:

First—That the court erred in holding that the Secretary of Labor could issue a warrant of arrest without probable cause and unsupported by oath or affirmation.

Second—That the court erred in holding that the Secretary of Labor and the Commissioner of Immigration could withhold part of the evidence upon which the warrant of arrest was issued and also refuse to produce same for use as evidence upon the request of the appellant.

Third—That the court erred in holding that the Secretary of Labor and the Commissioner of Immigration could disregard the affidavits establishing a prima facie case of citizenship, without first having a hearing to examine the witnesses who had submitted affidavits.

Fourth—That the court erred in holding that the Secretary of Labor and the Commissioner of Immigration accorded the appellant a fair hearing, they having held her incommunicado without the right of counsel from September 1, 1915, to September 21, 1915, to her great prejudice, permitting a then available witness to depart, and further prejudicing her rights.

FIRST:

THAT THE COURT ERRED IN HOLDING THAT THE SECRETARY OF LABOR COULD ISSUE A WARRANT OF ARREST WITHOUT PROBABLE CAUSE AND UNSUPPORTED BY OATH OR AFFIRMATION.

Article IV in amendment to the Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

The application for the warrant of arrest (Tr. 32-33), which is on a printed form, assumes the appellant to be an alien without any showing of alienage in support thereof. The application speaks of "the attached certificate," and yet there is no such certificate attached to the application. Under the caption as follows:

> (Tr. 33)
>
> (1) (Here state fully facts which show alien to be unlawfully in the United States. Give sources of information, and, where possible, secure from informants and forward with this application duly verified affidavits setting forth

the facts within the knowledge of the informants.)

Which calls for all of the facts, alienage as well as derilection, we find but the following given:

"Alien found in compromising surroundings with a man. Both detained. Man later released when landing was verified, as son of Native. Man stated to Inspector Robinson that woman was a prostitute. Alien as yet refuses to talk. It is believed that she may be Gum Chi, alias Bow Heung, warrant number 53210-76, dated June 17, 1911."

The application for the warrant concludes as follows:

(Tr. 33)

"Pursuant to Rule 22 of the Immigration Regulation there is attached hereto and made a part hereof the certificate prescribed in subdivision 2 of said Rule, as to the landing or entry of said alien, duly signed by the immigration officer in charge at the port through which said alien entered the United States."

Rule 22 subdivision 2 of the Immigration Regulations is as follows:

"*Application for warrant of Arrest*—The application must state facts, bringing the alien within one or more of the classes subject to deportation after entry. The proof of these facts should be the best that can be obtained. The application must be accompanied by a certificate of

landing (to be obtained from the immigration officer in charge at the port where landing occurred) or a reason given for its absence, in which case effort should be made to supply the principal items of information mentioned in the blank form provided for such certificate. Telegraphic application may be resorted to only in case of necessity and must state (1) that the usual written application has been made and forwarded by mail, and (2) the substance of the facts and proof therein contained."

The certificate referred to was never filed with the application. The letter of the Commissioner of Immigration of March 17th, 1916, finally transmitting the entire case to the Department of Labor, recites as follows:

(Tr. 26)

"It will be noted that the record is slightly out of chronological order, due to the fact that the formal request for the warrant of arrest does not indicate what, if any, evidence was transmitted therewith; for which reason the transcript of testimony of Wong Him Sing (the man who was in company with the alien at the time of her apprehension), taken on September 1st and 2d, is appended to the recorded."

This extract virtually admits that not only was no evidence transmitted with the application for the warrant of arrest, but no attempt was made to make a showing by evidence to the Secretary that the per-

son for whom the warrant of arrest was asked was in point of fact an alien. When we examine the record we find the application for the warrant, which is dated September 4-15, recites (Tr. 33) "Alien as yet refuses to talk," which was in effect a misrepresentation and suppression of the testimony given by this appellant, for while she did refuse to make an extended statement, she did on September 1st, 1915, answer some few questions, as appears at the end of the examination of the witness Wong Him Sing, from which the following is an extract: (Tr. 44)

"Q. When did you come to the United States?

A. I was born in the United States.

Q. Have you any documentary evidence to show that?

A. I have not here. It is with my attorneys."

The transcript of the testimony of the Wong Him Sing mentioned contains no testimony showing or tending to show that this appellant is an alien.

The procedure followed in the application for the warrant of arrest discloses a condition which is in substance much more than a delegation of power by the Secretary of Labor at Washington to the Commissioner of Immigration of San Francisco, which was overturned by this court in the case of Low Kwai vs. Backus, 229 Fed. 481, wherein it was held as follows:

"In this instance the acting Commissioner of Immigration undertook, as has been seen, to

satisfy the Secretary of Commerce and Labor that the woman here in question had violated the law, by simply saying:

'It is stated from an anonymous source that this woman is now practicing prostitution in either the Oriental Hotel or the Republic Hotel, keeping one of the rooms in either hotel from time to time. She was landed as the wife of a native, but her husband deserted her.'

The mere statement from an anonymous source that the woman referred to was violating the law evidently, and very properly, did not satisfy the Secretary of such fact, and, instead of requiring some sufficient evidence thereof, he undertook to depute to the Commissioner of Immigration at Angel Island, Cal., to satisfy himself, and thus to decide the question authorizing the arrest of the party charged that was committed by Congress to the Secretary of Commerce and Labor only. That course, in our opinion, was wholly unauthorized by the statute.

It results that the order appealed from must be reversed, and the cause remanded, with directions to discharge the petitioner. It is so ordered."

See also *Hanges* vs. *Whitfield,* 222 Fed. 745, *Ex parte Lam Pui* 217 Fed. 456, *Ex Parte Lam Fuk Tak* 217 Fed. 469 and *Jouras* vs. *Allen* 222 Fed. 756.

It is obvious that not only has the discretion committed to the Secretary of Labor by the statute been abused, but even the Constitution of the United

States and its inhibitions are disregarded in issuing warrants of arrest unsupported by oath or affirmation and in the face of a claim of American citizenship, even though knowledge of the said claim was thus withheld from the Secretary by the local Commissioner.

In the case of *Moy Suey* vs. *United States,* 147 Fed. 697, the Circuit Court of Appeals for the Seventh Circuit Court, speaking through Circuit Judge Grosscup, held as follows: Pages 698-699:

> "But when a person physically and politically present in the United States at the time he is arrested for deportation, claims that he is an American born citizen, and resists deportation on the basis of his rights of citizenship, the case is an entirely different one. Nativity gives citizenship, and is a right under the Constitution. It is a right that Congress would be without constitutional power to curtail or give away. It is a right to be adjudicated in the courts, in the usual and ordinary way of adjudicating constitutional rights. No rule of evidence may fritter it away. When such right is in court asking for the protection of the law, no question of public policy can affect it. The citizen deported is banished and banishment is a punishment that can follow only a judicial determination in due process of law. Black's Law Dictionary, 4 Blackstone Commentaries, 377."

"But there is a fundamental distinction between the case of a citizen of the country who has left the country and is asking to re-enter it, and is a citizen of the country who has never left it, but whom the government is asking to deport; and while it is true, now that the Supreme Court has so decided that the political power of the government may say whether a citizen of the country who has gone away shall be allowed to return or not, it seems to us uncontrovertible that a citizen of the country, who has not gone out may not be deported or banished until the right of the government to deport or banish has benn judicially determined. And, approached from this point of view, the case made out by appellant entitles him to a reversal of the order of the District Court. The order of the District Court, affirming the order for the deportation of appellant is reversed, and the cause remanded with instructions to discharge the appellant."

See also *Gee Cue Bing* vs. *United States,* 184 Fed. 383, a later case by the Circuit Court of Appeals for the Fifth Circuit.

SECOND:

THAT THE COURT ERRED IN HOLDING THAT THE SECRETARY OF LABOR AND THE COMMISSIONER OF IMMIGRATION COULD WITHHOLD PART OF THE EVIDENCE UPON WHICH THE WARRANT OF ARREST WAS ISSUED AND ALSO REFUSE TO PRODUCE SAME FOR USE AS EVIDENCE UPON THE REQUEST OF THE APPELLANT.

The regulations promulgated which govern such executive deportation proceedings are found in Rule 22 sub. 4 as follows:

> "Executive of warrant of arrest and hearing thereon:
>
> (a) Upon receipt of a warrant of arrest the alien shall be taken before the person or persons therein described and granted a hearing to enable him to show cause, if any there be, why he should not be deported.
>
> (b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the fur-

ther conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief."

Upon the hearing we find the following:

(Tr. 55)

Q. You are now brought before me, an immigrant inspector, to give you an opportunity to show cause, if you have any, why you should not be deported in conformity with law.

A. I can give you no other reason except I was born here.

Q. You are further notified that you have the privilege of inspecting the warrant of arrest and all the evidence upon which it was issued.

The evidence upon which the warrant of arrest was presumably issued was the application therefore, and said application contained the following:

(Tr. 33)

"It is believed that she may be Gum Chi, alias Bow Heung warrant number 53210-76, dated June 17, 1911."

On September 7, 1916, the following was placed of record in a hearing held on that day:

(Tr. 51)

"NOTE: This alien was taken to Miss Cameron's Mission the other day by Inspector Robinson of this Service and two of the girls under Miss Cameron's care, formerly inmates of houses of prostitution, identified this girl, one stating that she was Gum Chi, the other one stating that she was Bow Heung. Warrants of arrest have been issued for a certain Gum Chi with the alias Bow Heung, and it is my understanding these girls stated that the girl now under arrest was an inmate of a house of prostitution at 12 Portola Alley. If this information is correct it is evident that she is a girl reported to this office some time ago as having been smuggled into this country from the steamer "Manchuria." An investigation along that line is now being made inasmuch as the alien refuses to give any information concerning her nativity."

Now the warrant of deportation herein is based on the conclusion that this appellant Chin Ah Yoke is really Wong Ah Muy, an alien who arrived at San Francisco on the Shinyo Maru, October 7, 1912. Chin Ah Yoke firmly denies this, and the Immigration officers as firmly affirms it. Now it is obvious that if this appellant was identified as a Chinese woman for whom a warrant of arrest had been issued charging her under the fictitious or fanciful names of Gum Chi, alias Bow Heung, and said warrant was dated June 17, 1911, she, this appellant, could not well be the Wong Ah Muy, who did not enter the United

States until October 7, 1912, almost sixteen months after the issuance of said warrant. This appellant was positively identified by two witnesses as the Chinese woman for whom the Gum Chi alias Bow Heung warrant was issued (Tr. 51), which warrant was issued on June 17th, 1911, and as it presumably follows the usual printed form that warrant alleges a residence in the United States for some time prior thereto, hence this warrant and the evidence upon which it was issued would render untenable the theory of the Immigration officers that the appellant was the Wong Ah Muy who first entered the United States on October 7, 1912, and would most substantially corroborate the appellant claim that the Immigration officers have made a mistake of identity in attempting to identify her as Wong Ah Muy.

The regulations governing such hearings accord the appellant and her counsel the right to inspect the evidence on which the warrant was issued and also to offer evidence (Rule 22, Sub. 4, (a) and (b) supra) and to exercise this right the appellant by her counsel made seasonable application on December 20, 1915.

(Tr. 66-67)

"Request is hereby made that the statements made by ' two of the girls under Miss Cameron's care,' wherein this Chin Ah Yoke was identified as a certain Gum Chi, and further as a certain Bow Heung, may be presented and filed with the record herein, so that they may be inspected by the said detained and her counsel. It is also de-

sired that the warrant of arrest for the certain Gum Chi alias Bow Heung be also presented for the inspection of the said Chin Ah Yoke and her counsel. The said Chin Ah Yoke in furtherance of the above and foregoing request desires to state that if the said requests are not complied with she desires to protest at the said refusal to so comply with her said request, and to protest the action of the officer before whom this hearing was conducted.

The request was disposed of by the Acting Commissioner three months later, March 17, 1916, as follows, quoting first from his letter to the appellant's counsel.

(Tr. 30-31)

"With regard to your further request that there be made part of the record (28) statements of girls in a Presbyterian Mission who identified the defendant as Gum Chi or Bow Heung, and that there be produced for your inspection the warrant of arrest for the last-mentioned person, you are advised that it does not appear from the record that those statements were recorded, and the first part of your request cannot therefore be complied with. You are informed, however, that these references in the record to Gum Chi and Bow Heung are entirely immaterial, and the introduction of the warrant of arrest in that case cannot therefore serve any useful purpose."

And in the letter of the Acting Commissioner on

the same date, March 17, 1916, to the Commissioner-General of Immigration as follows:

(Tr. 29)

> "The attorney's demand that testimony and warrants referring to a certain Gum Chi or Bow Heung be made a part of the record has been denied, first on the ground that the statements referred to were not made of record, and secondly, because they were subsequently shown to be immaterial."

The statements of these two girls in the Presbyterian Mission may not have been reduced to writing and made of record in the case of this appellant, but their evidence may none the less have been of record as part of the foundation for the issuance of the Gum Chi or Bow Heung warrant 53210 7-6, dated June 17, 1911, which evidence this appellant was unsuccessful in her endeavors to have incorporated in the record in her case.

The phrases "shown to be immaterial" and "entirely immaterial," in the letters quoted from are the conclusions drawn from the Memorandum for the Commissioner dated Jan. 8, 1916 of J. X. Strand (Tr. 70-71) from which the following is quoted:

> "I accordingly searched the book of arrivals in the Chinese Division covering the period in question, and finally located the record of Lim Yuen, 12017/5546, and from this record traced that of Wong Ah Mui (record No. 11266/32029, both herewith as exhibits), and from the photo-

graph of this applicant I readily identified her as the girl now under arrest; a comparison of the enlarged photographs 3 and 4, taken of the girl under arrest, with the enlargements of the photographs 1 and 2 taken of the girl who was admitted, shows conclusively that they represent one and the same person—[63] the pit at the inner corner of right eyebrow and on left cheek demonstrate this."

The evidence suppressed and withheld in violation of the said regulations and which the appellant was prevented from submitting for the consideration of the Secretary of Labor, was diametrically opposed to the conclusions of Inspector Strand and Acting Commissioner Boyce, and would we submit, have shown that they had made a mistake in identity. The entire evidence should have been received, so that the Secretary might have received and weighed the same, instead of being limited in his consideration of this case to the conclusion of Inspector Strand. The function of judgment and consideration of the evidence is an obligation placed by statute upon the Secretary of Labor, and when evidence is offered it should be received and considered by that official. His subordinates, located thousands of miles away from him, cannot exercise this function for him. In the present case the evidence was in the possession of the local authorities and they wilfully withheld the same from the appellent and her counsel and the Secretary of Labor as well, and imposed upon them their adverse conclusion instead of the evidence. In re *Cam Pon,*

168 Fed. 479, This Court held as follows, Judge Gilbert speaking.

> "But the applicant upon his appeal from the decision of the local officer was entitled to the benefit of all the material evidence which was before the inspector. To withhold any thereof, and to exclude it from the record on the appeal, was to deny him the right of appeal which the statute gives him. The testimony of a witness which was on the whole favorable to the applicant's contention was by inadvertence omitted from the record on the appeal, and was not considered in the hearing thereof. It makes no difference that such evidence was taken at the instance of the inspector, and that it never came to the attention of the applicant or his counsel; it was a portion of the evidence taken by the inspector as an officer of the government, whose duty it was to act impartially and to ascertain the truth as to the question at issue. A portion of the testimony so omitted was direct evidence to the effect that the applicant was born within the United States. The inspector discredited it, but the applicant was entitled to the benefit of it on the appeal. It is no answer to this to say that portions of the testimony of that witness tended to contradict certain statements of Look Wing. Having been denied the benefit of all the testimony taken upon the question of his right of admission to the United States, the applicant has been deprived the right of appeal which the

statute confers upon him, and he may, therefore, upon habeas corpus, test the legality of his imprisonment. In re Monaco (C. C.) 86 Fed. 117; *United States* vs. *Wong Chung* (D. C.) 92 Fed. 141; *United States* vs. *Chin Fee* (D. C.) 94 Fed. 828; *Rodgers* vs. *United States,* 152 Fed. 346, 81 C. C. A. 454; *United States* vs. *Nakashima,* 160 Fed. 842, 87 C. C. A. 646."

The right to submit evidence has been abundantly upheld by the Supreme Court of the United States. *Chin Yow* vs. *U. S.* 208 U. S. 8, wherein the Court held, Justice Holmes speaking:

> "We recur in closing to the caution stated at the beginning, and add that, while it is not likely, it is possible, that the officials misinterpreted rule 6 as restricting the right to obtain witnesses which the petitioner desired to produce, or rule 7, commented on in *United States. vs. Sing Tuck,* 194 U. S. 161, 169, 170, 48 L. ed. 917, 921, 24 Sup. Ct. Rep. 621, as giving them some control or choice as to the witnesses to be heard. But, unless and until it is proved to the satisfaction of the Judge, that a hearing properly so called was denied, the merits of the case are not open, and we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

and also in the case of *Low Wah Suey* vs. *Backus,* 225 U. S. 460.

THIRD:

THAT THE COURT ERRED IN HOLDING THAT THE SECRETARY OF LABOR AND THE COMMISSIONER OF IMMIGRATION COULD DISREGARD THE AFFIDAVITS ESTABLISHING A PRIMA FACIE CASE OF CITIZENSHIP WITHOUT FIRST HAVING A HEARING TO EXAMINE THE WITNESSES WHO HAD SUBMITTED AFFIDAVITS.

Possibly the best preliminary exposition of the point would be to quote the allegation in the petition with respect thereto: (Tr. 4, 5, and 6)

> "But on the contrary your petitioner alleges that she is not an alien, but a native-born citizen of the United States of America, having been born on or about the 23rd day of March, 1896, at No. 708½ Commercial St., in the city and county of San Francisco, State of California, of parents of the Chinese race then lawfully domiciled within the United States, and your affiant's father, Chin Duck Quong, has ever since been, and is now lawfully domiciled within [3] the United States, and that your petitioner's mother, Lee Shee, was at the time of the birth of your petitioner lawfully domiciled within the United States, and continued to reside herein until the time of her death, on or about the 20th day of June, 1900, at the family domicile at No. 708½ Commercial St., in the city and county, State aforesaid, and that your petitioner has re-

sided continuously within the United States from the time of her birth up to the present time, and in support of the said fact your petitioner offered at the hearing before the said Commissioner the sworn affidavit of your petitioner, the affidavit of your petitioner's father, the said Chin Duck Quong, the affidavit of Ho Shee, a Chinese woman who lived in the building in which your petitioner was born, and knew your petitioner from the time of her birth, and took care of, and raised your petitioner, after the death of your petitioner's mother, the affidavit of Chin Shee, a Chinese woman who has known your petitioner since your petitioner's birth, and knows that your petitioner is a citizen of this country, and has always resided herein, together with the affidavit of Chin Pak, who has known your petitioner since your petitioner was two or three years of age. Each of the said affidavits hereinabove referred to are annexed hereto in Exhibit "A," hereinafter mentioned, and your petitioner now specifically refers to said affidavits, with the same force and effect, as if the said affidavits, and each of them, were set forth in full herein, and immediately upon the arrest of your petitioner, and at all times thereafter your petitioner has maintained that she was a native-born citizen of the United States of America, and denied that she was the Wong Ah Mui, as claimed by the said Commissioner, and that the showing made by your petitioner of the fact that she was

a native-born citizen of the United States of America was more than a *prima facie* showing of the existence of the said [4] American citizenship of your petitioner, and your petitioner alleges that it was an abuse of discretion upon the part of the said Secretary of Labor and the said Commissioner of Immigration, and the immigration officials acting under, or in pursuance of their orders, to have ignored or decided against the said *prima facie* showing without first having examined and investigated the same, and your petitioner alleges that although the affidavits attesting the citizenship of your petitioner were filed with the said Commissioner, in opposition to the claim and contention of the said Commissioner that your petitioner was Wong Ah Mui, who had first entered the United States upon the 7th day of October, 1912, the said Commissioner, and the said Secretary of Labor violated the discretion committed to them by statute in such cases made and provided, and ignored and disregarded the said showing of citizenship, upon behalf of your petitioner, and failed and neglected to conduct an investigation or examination of the witnesses who had subscribed and sworn to the said affidavits, and the said Commissioner afforded your petitioner only the semblance of a hearing upon the question of her citizenship, in which they decided that she was not a citizen of the United States, without examining or conducting any investigation of

the witnesses who were the affiants of affidavits presented by your petitioner.

The affidavit of Chin Ah Yoke is found Tr. 56-57 and 58; The affidavit of her father Chin Duck Quong is found Tr. 58, 59 and 60; The affidavit of Ho Shee is found Tr. 60, 61 and 62; The affidavit of Chin Shee is found Tr. 62 and 63, and the affidavit of Chin Pak is found Tr. 64 and 65.

United States vs. *Wong Kim* Ark, 169 U. S. 649.

The supreme Court held in the case of *U. S.* vs. *Sing Tuck* 194 U. S. 161, as follows:

"We are of the opinion that the attempt to disregard and override the provisions of the statutes and the rules of the Department, and to swamp the courts by a resort to them in the first instance, must fail. We may add that, even if it is beyond the power of Congress to make the decision of the Department final upon the question of citizenship, we agree with the circuit court of appeals that the petition for habeas corpus ought not to be entertained unless the court is satisfied that the petitioner can make out at least a *prima facie* case. A mere allegation of citizenship is not enough. But, before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with. Whether after that, a further trial may be had we do not decide."

The only evidence that appellant is an alien is the

opinion of the Immigration officers that she is Wong Ah Moy. If she is Chan Ah Yoke and not Wong Ah Muy, then the government's case falls. The appellant offered to prove she was not Wong Ah Muy, by offering the evidence considered under the Second Point of this brief. The Inspector rejected the evidence therein referred to, and substituted his personal judgment and opinion for the Secretary's consideration, in lieu of the said evidence. Under this, the Third Point, we are to consider the offer of the Appellant to prove affirmatively her American birth. The mistake in law made by the Cimmissioner and the Secretary, is aptly expressed in the letter from the former to the latter (Tr. 28) wherein it is written:

> "To meet the burden of proof resting upon the defendant, affidavits of the woman under arrest, of her alleged father, and of three other Chinese persons, have been introduced, all of which are intended to establish her claimed American birth; but in the opinion of this office that showing is far from convincing, even in the absence of the—to my mind—conclusive proof presented by the landing record referred to. In view of the above facts it is recommended that a warrant of deportation issue."

In an executive deportation proceeding there is as a matter of law, no BURDEN OF PROOF RESTING UPON THE DEFENDANT. In fact the law places the burden of proof of alienage upon the moving party—the Government—and their decision

must be based on some evidence.

In re *Ong Chew Lung* vs. *Burnett,* 232 Fed. 853, this court held speaking through Circuit Judge Gilbert:

> "It is not our function to weigh the evidence in this class of cases; but we may consider the question of law whether there was evidence to sustain the conclusion that the appellant, when he first came, fraudulently entered the United States. We find that that conclusion rests upon conjecture and suspicion, and not upon evidence. In the absence of substantial evidence to sustain the same, and order of deportation is arbitrary and unfair, and subject to judicial review. *Whitfield* vs. *Hanges* 222 Fed. 745, 751, 138, C. C. A. 199; *McDonald* vs. *Siu Tak Sam,* 225 Fed. 710, 140 C. C. A. 584; *Ex parte Lam Pui* (D. C.) 217 Fed. 456."

See also *Chan Kam* vs. *U. S.* 232 Fed. 855 which is an opinion by this Court written by Circuit Judge Marrow, in which the same principle is upheld.

Lewis vs. *Frick* 233 U. S. 291.

U. S. vs. *Williams* 200 Fed. 538.

U. S. vs. *Williams* 189 Fed. 915
affirmed in 206 Fed. 460.

U. S. vs. *Williams* 175 Fed. 274.

A defendant must have a fair opportunity to present evidence in his favor *Chin You* vs. *U. S.* and in re *Cam Pon,* supra, and must also be appraised of the evidence against her. *Ex parte Petkox* 212 Fed. 275.

In the present case the evidence of the witnesses for the appellant as outlined in the affidavits as the foundation of their examination was received by the Immigration authorities on Dec. 20, 1915, and held until March 17, 1916, and then on that day without the witnesses having been heard or examined at all, the bare affidavits were sent to the Secretary of Labor with the comment (Tr. 28)

> "but in the opinion of this office that showing is far from convincing, even in the absence of the—to my mind—conclusive proof presented by the landing record referred to. In view of the above facts it is recommended that a warrant of deportation issue."

Here is a case where the appellant was accorded but a semblance of a hearing, not a hearing in accordance with the fundamental principles that inhere in due process of law nor any fair or adequate opportunity to present her evidence or be heard in good faith.

Chin You vs. *U. S.* 208 U. S. 8 (Supra)

Yamataya vs. *Fisher* 189 U. S. 86.

Ex parte Petkos 212. Fed. 275 (supra.)

In re *Cam Pon* 168 Fed. 479 (supra.)

During the period of almost three months which elapsed from Dec. 20, 1915 to March 17, 1916, during which these affidavits, which set forth the scope of this appellant's case, were held by the Commissioner of Immigration, hundreds of persons of the Chinese race, claiming American citizenship through birth

therein and through the operation of Sec. 1993 of the Revised Statutes, have applied to that official for admission into the United States, and in no instance has even a single such case been disposed of without having a hearing at which the witnesses were called for and thoroughly examined by question and answer touching the facts upon which the claim of citizenship was based. How then can it be held that a full and fair hearing has been accorded this appellant upon the sacred ground of American citizenship when her witnesses have not been heard or examined at all, as would have been done had she sought admission into the United States as a native-born citizen thereof. In the cases of *Moy Suey* vs. *United States* 147 Fed. 697 Supra and *Gee Cue Bing* vs. *United States* 184 Fed. 383 Supra, it was held that the person physically and politically present when arrested within the United States was entitled to greater rights and privileges than the person who had voluntarily left and sought to re-enter the United States. In the case at bar the appellant is denied even equal rights with applicant for admission, much less the greater right upheld in the two cases last cited. If appellant sought re-entry into the United States and presented the affidavits filed in this case, the different affiants would have been made the subject of prompt examination by question and answer, and in no instance would that highest test of credibility and method of ascertaining the truth have been withheld from such an applicant for admission, and this being so, upon what legal principle can at least

the equal privilege be accorded when the person asserting American citizenship is arrested when politically and physically present in the United States?

The sacred rights of American citizenship should have adequate protection from the arbitrary action of executive officers, and an opportunity to be heard which is at least adequate to the importance of the great issue involved.

FOURTH.

THAT THE COURT ERRED IN HOLDING THAT THE SECRETARY OF LABOR AND THE COMMISSIONER OF IMMIGRATION ACCORDED THE APPELLANT A FAIR HEARING, THEY HAVING HELD HER INCOMMUNICADO WITHOUT THE RIGHT OF COUNSEL FROM SEPTEMBER 1, 1915, TO SEPTEMBER 21, 1915, TO HER GREAT PREJUDICE, PERMITTING A THEN AVAILABLE WITNESS TO DEPART AND FURTHER PREJUDICE HER RIGHTS:

This appellant was arrested September 1, 1915 and on that day she testified as to her American citizenship (Tr. 44.) On September 2, 1915, the warrant of arrest was issued and it provided as follows: (Tr. 31-32)

> "Pending disposition of her case the alien may be released from custody upon furnishing satisfactory bond in the sum of $1,000.00."

The right of bail in such cases is not based alone on the regulations, which recite as follows: Rule 22, subd. 5:

> "Sub. 5 Release under bond. The amount of any bond under which an arrested alien may be released shall be $500.00, unless different instructions are given by the Department, which also shall, prior to release, approve the bond, except that the approval of the local United States Attorney as to form and execution shall be sufficient where, to avoid delay, the immigration officer in charge deems it proper to submit the bond to such attorney for approval. Aliens who are unable to give bail shall be held in jail only in case no other secure place of detention can be found."

are not the source of power in this matter of bail but in turn are based on the statute, the General Immigration Law, provided in Sec. 20 as follows:

> "That pending the final disposition of the case of any alien so taken into custody he may be released under a bond in the penalty of not less than $500.00 with security approved by the Secretary of Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States."

The hearing of September 1st, 1915, recites as follows: (Tr. 44)

"Q. When did you come to the United States?

A. I was born in the United States.

Q. Have you any documentary evidence to show that?

A. I have not here. It is with my attorneys.

Q. Where are your parents?

A. I don't want to tell you anything about them.

Q. How do you expect to leave this station unless you furnish us [39] with information to satisfy us that you are entitled to remain in the United States, you being of the Chinese race?

A. Don't care; I don't want to tell you anything.

Q. Do you realize that you will be held at this station until you make the proper statement to show your right to be in the United States?

A. I don't see why you could deport me, or why I cannot stay in this country."

The hearing of September 20th, 1915 recites as follows: (Tr. 55)

"Q. You are further notified that you have the privilege of employing counsel. Do you wish to avail yourself of that privilege?

A. My case is taken care of by my father.

Q. Do you wish to employ counsel to repre-

sent you in any further hearing in this case?

A. I leave that to my father. He can hire an attorney for me.

Q. Your attorney, no doubt, will make the necessary arrangements for your release under bond in the sum of $1,000, that being permitted under the terms of the warrant, when we were satisfied as to your identity. A. All right.

It is shown that the right of bail was withheld from September 1, 1915 to September 20, 1915 in defiance of the plain direction of the Statute.

It is further shown that the right of counsel was withheld until September 20th, 1915, until long after the witness, Wong Him Sing, had been released and permitted to go his way. When the right of counsel was accorded, the work of this witness in advising this appellant out of the plentitude of his criminal experience (Tr. 40-41-46-47) to give no information about herself or who or what she was until an attorney could come and see her and talk to her (Tr. 57) had left its venemous sting, and we find the appellant guided by that advice so given her, and then being misjudged and discredited therefore.

A certain protest and request was made with respect to this witness Wong Him Sing on December 20, 1915, as follows:

(Tr 66)

"We desire further to protest against the incorporation in the record herein of the testimony taken upon the 1st day of September, 1915, and

on the 2d day of September, 1915, from Wong Him Sing, otherwise known as Wong Ngee Ting, on the ground that the said testimony was taken in the proceeding contemplated against the said Chin Ah Yoke, and that the detained was at said hearing not permitted to be present with her counsel, so that she might question the said witness with respect to the subject matter of [58] his evidence detrimental to the said detained, and it is now desired and requested that the said Wong Him Sing be recalled as a witness, so that he may be examined or cross-examined at the instance of the said Chin Ah Yoke, and that now the right of attorney having been accorded her she may submit evidence on her own behalf from said witness.

This protest was answered to appellant's attorney almost three months later, March 17, 1916, as follows: (Tr. 30)

"In connection therewith it is noted that you filed a brief of exceptions, wherein you protest against the admission of the testimony of Wong Him Sing on the ground that the detained was not confronted by said witness and was not accorded the privilege of cross-examination by counsel, as a result of which you request the recall of that witness. In reply thereto you are advised that it is the understanding of this office that said witness lives in Yuma, Arizona, and that he was only in this city on a visit at the time the defendant was taken into custody; and

that this office has no authority or process by which his attendance as a witness could be compelled, or funds from which to defray the expenses incident thereto. It is unnecessary to state, however, that it is the desire of this office to hear all witnesses in the alien's behalf, and that if you wish to introduce this man as your witness, and have any means by which to accomplish that purpose, an opportunity will be accorded for the taking of such additional testimony."

In transmitting the record to the Secretary of Labor on March 17th, 1915, the following was set forth: (Tr. 28-29)

"It will be noted that the attorney of record has protested and excepted to the fact that the alien was held incommunicado from the date of her arrest until counsel was permitted to enter the proceedings; to the admission of the testimony of Wong Him Sing (taken into custody in company with the alien) on the ground [26] that the alien was not present with counsel; and to the fact that the privilege of cross-examination was not accorded; and has requested that the latter witness be recalled for the defense. It is believed that the action of this office was in no way prejudicial to the interest of the alien, and was entirely in accord with the regulations. It has assumed the position, and has so advised the attorney, that the further testimony of Wong

> Him Sing will be taken if his production is secured by counsel, this office having no power or process by which to compel his attendance as a witness, nor funds from which to defray the expense incident thereto. As to the right of cross-examination, it would appear that adjudicated cases hold that such privilege cannot be claimed as a right."

The testimony of Wong Him Sing was assumed by the acting Commissioner in his said letter to the Secretary of Labor to be the basis of the application for the warrant of arrest: (Tr. 26)

> "It will be noted that the record is slightly out of chronological order, due to the fact that the formal request for the warrant of arrest does not indicate what, if any, evidence was transmitted therewith; for which reason the transcript of testimony of Wong Him Sing (the man who was in company with the alien at the time of her apprehension), taken on September 1st and 2d, is appended to the record."

It at once becomes apparent how essential it would have been to the proper protection of the rights of this appellant to have shown by this witness Wong Him Sing, that he had advised her, as she sets forth in her affidavit (Tr. 56-57) and thus corroborated the showing of the appellant and not left her alone to stand the burden of this advice which in the black hour of her distress had guided her conduct before the Immigration officers, and prompted her to with-

hold the information about her birth, antecedents and life in this country, which would otherwise have been most freely given by her, and would not have so discredited her that the Immigration officers refused to investigate and examine her evidence of American citizenship.

The right of counsel should be timely given, that is,—given when it will be of some substantial service to such a person so proceeded against, not withheld until the witness, who should have been examined, has traveled thousands of miles away, and is now no longer accessible.

Hanges vs. *Whitfield* 209 Fed. 675.

Ex parte Lam Pui. 217 Fed. 456.

Ex parte Lam. Fuk Tak 217. Fed. 469.

Jouras vs. *Allen* 222 Fed. 756.

Whitfield vs. *Hanges* 222 Fed. 745.

In the latter case, decided by the Circuit Court of Appeals for the Eighth Circuit, it is held:

> "Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case and just to the party affected; that the accused shall be notified of the nature of the charge against him in time to meet it; that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity after all the evidence against him is

produced and known to him, to produce evidence and witnesses to refute it; that the decision shall be governed by and based upon the evidence at the hearing, and that only; and that the decision shall not be without substantial evidence taken at the hearing to support it In re *Rosser* 101, Fed. 562, 567, 41 C. C. A. 497; In re *Wood & Henderson,* 210 U. S. 246, 254, 28 Sup. Ct. 621, 52 L. Ed. 1046; *Interstate Commerce Commission* vs. *Louisville & Nashville R. R. Co.,* 227 U. S. 88, 91-93, 33 Sup. Ct. 185, 57 L. Ed. 431, *Ex parte Petkos,* (D. C.) 212 Fed. 275-278; *United States vs. Sibray* (C. C.) 178 Fed. 144-149. That is not a fair hearing in which the inspector chooses or controls the witnesses or prevents the accused from procuring the witnesses or evidence or counsel he desires. *Chin Yow* vs.*United States,* 208 U. S. 8, 11, 12, 28 Sup. Ct. 201, 52 L. Ed. 369; *United States* vs. *Sibray* (C. C.) 178 Fed. 144, 149; *United States* vs. *Williams* (D. C.) 185 Fed. 598, 604; *Roux* vs. *Commissioner of Immigration,* 203 Fed. 413, 417, 121 C. C. A. 523." * * *

* * *

"The provisions of the rule that the inspector shall grant the alien a hearing, that during the hearing he shall be permitted to inspect the warrant, and that at such stage thereof as the officer deems proper he shall be permitted to have counsel were made for the benefit of the alien for the purpose of giving him a fair trial. The liberty, and the property also, for if he is imprisoned he

must lose his business and sacrifice his property, of a permanent resident alien, like the appellees, as well as their deportation, are involved in the issue, and these provisions of the rule should be liberally construed to accomplish their plain purpose. To the same end the discretion of the inspector in determining when the alien shall inspect the warrant and when he shall have counsel should be exercised, so that his hearing shall be full and fair. A denial of permission to him to see the warrant and to have counsel within five minutes of the close of the hearing would be a clear abuse of discretion, and would render the provisions of the rule as administered 'inconsistent with law' and void. Although a law or rule be fair and just in appearance, yet if it is applied and administered by public authority with an evil eye and an oppressive hand, so as to deprive a person of his fundamental rights, it cannot be sustained. *Yick Wo* vs. *Hopkins,* 118 U. S. 356, 374, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Henderson* vs. *Mayor of New York,* 92 U. S. 259; 23 L. Ed. 543; *Chy Lung* vs. *Freeman,* 92 U. S. 275, 23 L. Ed. 550; *Ex parte Virginia,* 100 U. S. 339, 25 L. Ed. 676; *Neal* vs. *Delaware,* 103 U. S. 370, 26 L. Ed. 567; *Soon Hing* vs. *Crowley,* 113, U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145. One of the objects of this rule was to give, not to deprive, the alien of the benefit of counsel. The time when an alien, who is ordinarily ignorant of the law, of legal procedure, and of his

rights, may derive the most benefit of counsel is when he is arrested and his hearing begins. It would have been no abuse of the discretion of the inspector to have permitted the appellees to have counsel to advise them immediately upon their arrest, and to have permitted them and their counsel to inspect the warrant of arrest, to be present and to take part in the proceedings at and after the first stage of the examination and hearing of the aliens. Such a course would have been in accord with the fundamental principles of English and American jurisprudence consistent with the law, and it should have been pursued. The refusal of the inspection of the warrant of arrest and the refusal to permit the aliens to see and consult their counsel before, and to permit them to participate in the proceedings at, their examination directly tended to prevent a fair hearing upon the charges against them."

* * * * * *

In finally submitting this matter to the Court it is respectfully urged that the judgment of the lower Court should be reversed, for the reason herein set forth, and it is considered apt at this time to finally direct the attention of the Court to the language of Connor, District Judge, in the case of *Ex parte Lam Pui,* 217 Fed. 456 Supra, where the learned Judge states on page 465:

"Long, and frequently sad, experience teaches that when officers intrusted with the administra-

tion of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short and easily taken, step to do so when the liberty of the citizen is involved."

It is felt that the final judgment of this Court should be that this appellant should be discharged from custody, and that she go hence without day.

Respectfully submitted,

GEO. A. McGOWAN,
Attorney for Appellant.

Dated March 15th, 1917.

No. 2859

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHIN AH YOKE, alias JANE DOE,

Appellant,

vs.

EDWARD WHITE, Commissioner of Immigration for the Port of San Francisco,

IN THE MATTER OF CHIN AH YOKE, alias JANE DOE on Habeas Corpus,

Appellee.

BRIEF OF APPELLEE.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellee.

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No. 2859.

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IN THE MATTER OF CHIN AH YOKE, alias JANE DOE on Habeas Corpus,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE

This appellant was charged under the warrant of arrest of the Acting Secretary of Labor, dated September 11, 1916, (Trans. pp. 34 and 35) as follows:

> "That she is a prostitute and has been found practicing prostitution subsequent to her entry into the United States."

After a hearing had been held in pursuance of the directions contained in said warrant of arrest,

and the record in the case sent to the Department by the Commissioner General of Immigration, the Secretary of Labor, in the warrant of deportation issued by him (Trans. pp. 25 and 26) found "that she is a prostitute and has been found practicing prostitution subsequent to her entry into the United States, and may be deported in accordance therewith."

The evidence that was before the Secretary, and which amply supported his finding contained in the warrant of deportation, is as follows:

The testimony of Wong Him Sing, with respect to the circumstances under which he was found with the appellant in the Mon Ming (Mun Wing) Hotel, San Francisco (Trans. pp. 35 to 47); the affidavit of Donaldina Cameron of the Woman's Occidental Board of Foreign Missions of the Presbyterian Church, as to the reputation for immorality of said Hotel (Trans. p. 68); the certificate of John A. Robinson, Immigration Inspector, to the same effect (Trans. p. 69), and a statement of J. X. Strand, Immigrant Inspector in Charge of the local Immigration Station, that the appellant's demeanor evidently indicated that she was of the prostitute class (Trans. p. 70).

The appellant maintains, first: That she is a native born citizen of the United States, and therefore without the scope of the Immigration law, and secondly: that the hearing accorded her by the Immigration officials was unfair.

The application for the warrant of arrest made by the local Commissioner of Immigration to the Secretary of Labor (Trans. pp. 32 and 33) shows that the said Commissioner believed that the appellant may be one Gum Chi alias Bow Heung, an alien for whose arrest a departmental warrant was issued on June 17, 1911. From the reports of Inspectors Robinson (Trans. p. 69) and Strand (Trans. pp. 70 and 71), it appears that these officers were later informed that the appellant was in fact one Wong Ah Mui, an alien Chinese woman who was landed in San Francisco in 1912 as the wife of one Lim Yuen; that upon securing from the files of the Immigration office the record of the said Wong Ah Mui, and comparing the photograph of Wong Ah Mui contained in that record with this appellant, Inspector Strand was satisfied that the said Wong Ah Mui and this appellant were one and the same person (Trans. pp. 52 to 54 and 70 and 71).

In his letter transmitting the record of the case to the Secretary of Labor for decision, the local Commissioner of Immigration expressed the same opinion. (Trans. pp. 27 and 28). In the record, as so transmitted, were enlarged photographs of the appellant and Wong Ah Mui, from a comparison of which the Secretary, as is shown in the warrant of deportation (Trans. pp. 25 and 26) came to the conclusion that the appellant and Wong Ah Mui were identical.

The evidence indicated in the foregoing clearly justifies the finding, not only that the appellant was a prostitute, but also that she was an alien and therefore the execution by the appellee of the order of the Secretary of Labor that she be deported cannot be set aside by this Court unless the hearing in the Immigration proceeding was unfair.

WAS THE IMMIGRATION HEARING UNFAIR?

Appellant urges that the hearing was unfair in four respects. The treatment of the first in appellant's brief (pp. 21 to 27) is purely technical. The application of the local Commissioner of Immigration to the Secretary of Labor for a warrant of arrest contains the following statements (Trans. p. 33).

> "Alien found in compromising surroundings with a man. Both detained. Man later released when landing was verified, as son of Native. Man stated to Inspector Robinson that woman was a prostitute. Alien as yet refuses to talk. It is believed that she may be Gum Chi, alias Bow Heung, warrant number 53210/76, dated June 17, 1911."

Upon these statements the warrant of arrest (Trans. pp. 34 and 35) was issued. Appellant contends that such issuance of the warrant was in violation of Immigration Rule 22, which provides the procedure for expulsion cases; (1) because the application made no showing of alienage; (2) and be-

cause no certificate of landing in the United States accompanied the application.

As to alienage, the Secretary acted upon the statement in the application that the appellant was believed by the local Commissioner to be one Gum Chi alias Bow Heung, a record concerning whom was in the Department of Labor at Washington, said record showing her to be an alien. It is submitted that this justified the conclusion of the Secretary of Labor that this appellant was an alien, for the purpose of her arrest, she to be given an opportunity afterwards to show that she was not an alien. That same record of Gum Chi alias Bow Heung, in the Department of Labor, must be presumed to have contained such data concerning her landing as could have been furnished by a certificate of the local Commissioner. It is submitted that the rule was substantially complied with when the warrant was issued. The fact that it was afterwards established to the satisfaction of the local Immigration officers and the Secretary that this appellant was not the alien Gum Chi alias Bow Heung, but was the alien Wong Ah Mui, does not make her any the less subject to deportation under the law as an alien prostitute, in the proceeding here in question.

This is not a case, as appellant would make it appear, like *Low Kwai* vs. *Backus,* 229 Fed. 481, decided by this Court and cited in appellant's brief, page 24; for here the Secretary did not, in issuing

the warrant of arrest, make its execution conditional upon an authority delegated to an inferior officer to decide whether evidence subsequently secured would be sufficient to justify the execution of a warrant.

The warrant in the present case was issued unconditionally after the Secretary had determined for himself from the evidence before him that this appellant was probably an alien prostitute, and therefore felt warranted in ordering her arrest.

Should the Court consider the case of *Moy Suey,* vs. *U. S.,* 147 Fed. 697, quoted on page 26 of the appellant's brief, applicable to the present case, attention is invited to the decision of the same Court—the Circuit Court of Appeals for the Seventh Circuit—in *Moy Guey Lum* vs. *U. S.* 211 Fed. 91, 94, which, although not in terms, in effect overrules the said *Moy Suey* vs *U. S.* case.

As to the second point treated in appellant's brief (pp. 28 to 37), to wit: that the refusal to put into the record of this case evidence which at first led the Immigration officials to believe this appellant was the alien Gum Chi alias Bow Heung, the Government maintains that inasmuch as this appellant denied that she was the said alien, Gum Chi alias Bow Heung, (Trans. pp. 48 and 49) always asserting on the contrary that she was a native-born citizen of the United States of an entirely different name; and inasmuch as the Immigration officials

finally became satisfied that she was not the said Gum Chi alias Bow Heung, such evidence was immaterial and therefore did not come within the scope of the decision of this Court in *re Cam Pon,* 168 Fed. 479, cited in appellant's brief (pp. 34 and 35).

Appellant's third point (appellant's brief pp. 37 to 45) is that the fact that the Immigration officials did not personally examine the appellant and a number of other persons who filed affidavits in the case to the effect that the appellant was a native-born citizen of the United States constituted unfairness.

A careful examination of the Immigration record, as contained in the transcript, fails to show that either at the time those affidavits were filed or at any time thereafter, any request was made that the affiants be so examined. Before the hearing was closed, as appears from a letter written by the local Acting Commissioner of Immigration to this appellant's attorney (Trans. p. 30), the attorney was advised that it was the desire of the Commissioner of Immigration to hear all witnesses in this appellant's behalf that the attorney might wish to introduce. How, now, can the appellant through her attorney, be heard to complain that the affiants in question were not examined when they were not produced for examination, or when it is not even shown that a request was made for their examination?

The appellant complains that in cases where persons of the Chinese race, applying for admission into the United States, claim American citizenship, the witnesses in their behalf are always personally examined by the Immigration officers and that the same procedure ought, to say the least, be followed in the case of a person of the Chinese race claiming American nativity who has been arrested while already in the United States. The answer to this is simple; the witnesses examined in behalf of applicants for admission are always produced by the applicant's relatives or friends in person before the Immigration officers. If, in the present case, the persons who made the affidavits had been produced before the said officers, their testimony would have been duly taken.

The fourth contention in the appellant's brief (Trans. pp. 45 to 56) is that she was greatly prejudiced by having been held incommunicado by the Immigration officers from September 1, 1915, the day on which she was taken into custody, until September 21, 1915, when she retained counsel and was enlarged on bail.

The first warrant of arrest (Trans. pp. 31 and 32) was issued in Washington, September 2, 1915, necessarily in pursuance to a telegraphic application therefor, for she was taken into custody on September 1; and the second warrant of arrest (Trans. pp. 34 and 35) was presumably issued upon receipt of the formal application (Trans. pp. 32 and 33). On September 20 the appellant was given an oppor-

tunity to inspect the warrant of arrest and all the evidence upon which it was issued; and further, to employ counsel and furnish bail (Trans. p. 55).

The specific claim made that prejudice resulted from the fact that the granting of the right of counsel was deferred until September 20, is that the opportunity was thereby lost to the appellant to cross-examine Wong Him Sing, the man with whom she was taken into custody.

The said Wong Him Sing was examined on September 1 (Trans. p. 35), the day that he and the appellant were taken into custody, and again on September 2 (Trans. p. 45), the day upon which the first warrant of arrest was issued in Washington, and presumably before the warrant could have been communicated to the local Immigration office, even by telegram. It is shown in the transcript of his testimony on September 1 (Trans. p. 35) that the fact of his American citizenship was then known to the Immigration officers. Those officers had no authority to hold him—an American citizen—until the arrival of the warrant; and they had no authority to permit counsel to appear in the case until the warrant was received. The Immigration officers were not responsible because Wong Him Sing, after his testimony was taken on September 2, returned to his home at Yuma, Arizona.

The local Commissioner, in his letter to the appellant's attorney (Trans. pp. 29 to 31), stated:

"With reference to the case of Jane Doe, alias Wong Ah Mui, alais Ah Yoke, arrested under Departmental warrant dated September 2 last, and which you represent as counsel, you are advised that the transmittal of this record to the Department has been unavoidably delayed until this date, when the record is being sent forward.

In connection therewith it is noted that you filed a brief of exceptions, wherein you protest against the admission of the testimony of Wong Him Sing on the ground that the detained was not confronted by said witness and was not accorded the privilege of cross-examination by counsel, as a result of which you request the recall of that witness. In reply thereto you are advised that it is the understanding of this office that said witness lives in Yuma, Arizona, and that he was only in this city on a visit at the time the defendant was taken into custody; and that this office has no authority or process by which his attendance as a witness could be compelled, or funds from which to defray the expenses incident thereto. It is unnecessary to state, however, that it is the desire of this office to hear all witnesses in the alien's behalf, and that if you wish to introduce this man as your witness, and have any means by which to accomplish that purpose, an opportunity will be accorded for the taking of such additional testimony. With regard to your further request that there be made part of the record statements of girls in a Presbyterian Mission who identified the defendant as Gum Chi or Bow Heung, and that there be produced for your inspection the warrant

of arrest for the last-mentioned person, you are advised that it does not appear from the record that those statements were recorded, and the first part of your request cannot therefore be complied with. You are informed, however, that these references in the record to Gum Chi and Bow Heung are entirely immaterial, and the introduction of the warrant of arrest in that case cannot therefore serve any useful purpose."

Appellant fails to show that she ever made an effort even to secure an affidavit from Wong Him Sing. The presence of counsel for appellant to cross-examine Wong Him Sing on September 1 or 2 was not authorized by Immigration Rule 22 and the Immigration officers, in the absence of the power of subpoena, were not obliged to secure his attendance for cross-examination thereafter.

Low Wah Suey vs. *Backus,* 225 U. S. 470.

It is submitted that the District Court was right in holding that the hearing given this appellant by the Department of Labor was not unfair, and should, therefore, be sustained.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. U. S. Attorney.

Attorneys for Appellee.

No. 2859

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

CHIN AH YOKE, alias Jane Doe,

Appellant,

vs.

EDWARD WHITE, Commissioner of Immigration for the port of San Francisco,

In the Matter of CHIN AH YOKE, alias JANE DOE, on Habeas Corpus,

Appellee.

Petition for Rehearing

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F. D. Monckton,
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GEO. A. McGOWAN,
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Bank of Italy Building,
San Francisco, California.

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Appellee.

Petition for Rehearing

To the Honorable Wm. B. Gilbert, Presiding Circuit Judge, and to the Associate Justices of the United States Circuit Court of Appeals for the Ninth Circuit:

This appellant humbly presents herewith her petition for a rehearing herein based upon the premise that while this Honorable Court has decided that her claim of American citizenship may be deter-

mined without an adjudication in a Court before the Judicial Department of the Government of the United States, and further that the burden of proof of alienage did not rest upon the government, but on the other hand that the burden of proof of citizenship did rest upon the appellant, there yet remains unadjudicated and undetermined, in the opinion of appellant, all save one of the allegations of unfairness of the hearing before the Immigration authorities.

This high legal affirmation of the right to dispose of the sacred rights of American citizenship of one admittedly for many years part and parcel of our civic population in a purely administrative hearing without the protection and benefit of those legal safeguards which time and experience of past generations have deemed expedient and essentially necessary to surround our judicial procedure, we feel that all the more caution should be exercised to see that a full and fair hearing is accorded in the executive hearing.

In the case of U. S. v. Williams, 185 Fed. Rep. 698, Judge Holt speaks very clearly about hearings of this kind. He states:

> "It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the

prosecution. He is held in seclusion, and is not permitted to consult counsel until he has been privately examined under oath. The whole proceeding is usually substantially in the control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor and judge. The Secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never sees or hears the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them, and if they are deprived of any such right the proceeding is clearly irregular, and any order of deportation isssued in it invalid."

Of the rights so accorded in the regulations, is the right to see all the evidence upon which the warrant of arrest is based. This is a most essential right. Yet in the present case the evidence upon which the Secretary of Labor is presumed to have acted in issuing the warrant was withheld and never shown to the appellant or her counsel. (See second point—appellant's brief, pages 28-36). The Government (Appellee's brief, pages 6 and 7) admits the fact, but seeks justification in the assertion that the evidence afterwards became immaterial. We take issue upon this point and maintain its greatest materiality and relevancy to the rights of this appellant to defend herself against the

charge of alienage brought against her. This appellant is ordered deported as an ALIEN on the presumption that she is a certain Wong Ah Moy, evidence of whose alienage is found in the record of her admission to the United States on October 7, 1912. Identity was in issue. If this appellant was not this Wong Ah Moy, there was no evidence of alienage to overcome the prima facie exparte case of citizenship made out by the appellant. Evidence that this appellant was in the United States upwards of a year prior to October 7th, 1912, would conclusively show that she was not the Wong Ah Moy in question. This identical evidence and of sufficient weight and materiality to cause the Secretary of Labor to issue a warrant of arrest on June 17th, 1911, was in the hands of the local Commissioner of Immigration. This appellant called for it to make affirmative use thereof, as evidence in her own defense. This was doubly her right; first because it was the evidence upon which the warrant of arrest herein was issued, and secondly, because it was evidence material and sufficient to be submitted by her on her behalf to prove she was not Wong Ah Moy. Yet it was refused. It is conceded that the local Commissioner fianlly determined this issue here in San Francisco by himself, withholding the evidence in question, and never exhibiting it to this appellant so that she could either affirmatively answer it, or make use of it in her defense, nor was it finally submitted to the Secretary

in this case. In this action we feel the regulations have been violated and the appellant unduly hampered in making her defense and in submitting evidence on her own behalf. In Low Kwai vs. Backus, 229 Fed. 481, this court held that the power to determine the weight and sufficiency of evidence to issue a warrant of arrest was placed by the statute on the Secretary of Labor, and he could not delegate that power to an inferior officer. How can that holding be reconciled with what was done in the present case? Evidence sufficient and material enough to cause the Secretary of Labor to issue this warrant of arrest is, on the judgment alone of the local Commissioner, laid out the case finally and entirely. The defendant could neither inspect it, meet it, answer it, or avail herself of the material benefit which its possession would bestow upon her as showing affirmatively that she had been identified as having been in the United States for upwards of a year before Wong Ah Moy entered the United States, and hence, that no matter how much she might resemble her, she was not in point of fact this said Wong Ah Moy. It is no answer to say that in theory, if not in fact, this evidence was before the Secretary when he issued the warrant of arrest. That was many months before. Its non-availability when the case was determined, when it was decided that this appellant was Wong Ah Moy, and not Chin Ah Yoke, was the prejudicial point. Here was evidence most material to the defendant

purposely laid out of her case, which was condemned when unintentionally done by this court In re Cam Pon, 168 Fed. 479, in an admission proceeding. This court has now held that one physically present within our borders as part and parcel of our population, has no greater rights, even when citizenship is involved, than one without our borders seeking either admission or re-admission. Yet in the actual practice of the immigration authorities the holding of the court is to accord them NOT EVEN EQUAL, but MUCH LESS RIGHTS than the applicant without our borders, as contended for in the Third Point of Appellant's brief (pages 37-45). No applicant for admission or re-admission can submit his case on affidavits. All the witnesses are called for and must be presented for verbal examination. The cases are set and re-set until all the witnesses appear and are fully verbally examined. In this manner the truth or falsity of the claim is determined by the help of a rigid verbal examination of the witnesses. The aids afforded by such an examination are as much the right of the applicant for admission, when in his favor, as the right of the government when adverse to the applicant. To reject the claim of citizenship made out by the affidavits without verbally examining the witnesses, is to summarily and arbitrarily deprive the appellant of such a hearing as would, as of course, be accorded a like applicant for admission.

It is respectfully submitted that a rehearing should be accorded herein for the reasons herein stated.

Respectfully submitted,

GEO. A. McGOWAN,
Attorney for Appellant.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for a rehearing is in judgment of counsel well founded and is not interposed for delay.

GEO. A. McGOWAN,
Attorney for Appellant.

No. 2860

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUJAR SINGH and INDAR SINGH,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANTS.

JOSEPH P. FALLON,
Attorney for Appellants.

Filed this.....day of April, 1917.

FRANK D. MONCKTON, Clerk.

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Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2860

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

GUJAR SINGH and INDAR SINGH,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANTS.

This is an appeal from the order and judgment of the lower Court sustaining the demurrer interposed and denying a petition for a writ of habeas corpus.

The above named appellants are Hindu aliens who came to the United States in the years 1907 and 1909 respectively, and were admitted after due inspection by the immigration officials at the Port of San Francisco.

They were arrested on the 22nd day of April, 1915, at Sandpoint, Idaho, by the immigration authorities and after a hearing before the Department of Labor were ordered deported.

The warrant of deportation stated two grounds for the action of the Department of Labor, to wit:

1. That the aliens came across the border from Canada into the United States without inspection.

2. That the aliens were likely to become public charges.

To the first charge the aliens in their preliminary examination admitted that they had recently come from Canada but subsequently denied ever having made any such statement.

At the time the statement was alleged to have been made the aliens were without the presence of counsel or friends, and could easily have been misunderstood through error in translation. (Ex parte Chan Kam, 232 Fed. 855.)

The alien Indar Singh is especially pronounced in his assertions that he never crossed the border and that he had worked in the saw mills along the Montana and Idaho side of the border line.

It is admitted by the Department of Labor that these men came to the United States in the years 1907 and 1909 respectively and were duly and regularly admitted at the port of San Francisco, but contend that because they had been in Canada and had recently entered the United States, that fact started the running of the three-year statute anew and any prior residence in the United States would not prevent their deportation.

Our contention is that these men never left the United States after arriving at the port of San Francisco in the years 1907 and 1909; that they were saw mill laborers and were working along the

border line of Canada at the time of their arrest but had not crossed the line. There is no evidence adduced at all that the aliens had ever crossed the line. They were taken from a box car at Sandpoint over seventy-five miles from the border and in a country teeming with the lumber industry and saw-mills. The inspector reaches the conclusion that they were across the line because they had on some wearing apparel that indicated a Canadian origin, and makes a report that the aliens' claims are "fishy". If government officials were permitted to deport aliens on such flimsy evidence then there could be no security for the alien in this country.

In the absence of substantial evidence to sustain the same, the order of deportation is arbitrary and unfair and subject to judicial review. (Whitfield v. Hanges, 222 Fed. 745, 751; McDonald v. Sier Tak Sam, 225 Fed. 710; Ex parte Sam Pui, 217 Fed. 456; Ex parte Chan Kam, 232 Fed. 855; Backus v. Owe Sam Goon, 235 Fed. 847.) In this case there is no substantial evidence to maintain the first ground set out in the warrant of deportation.

As to the second charge that the aliens are likely to become public charges it will be observed that at the time this case was considered by the lower Court the cases of Healy v. Backus, 209 Fed. 200, and Marshall v. Backus, 213 Fed. 123, had just been decided by this Court adversely to the appellants in those cases and that fact no doubt had much to do with influencing the opinion of the lower Court in the instant case. In the cases just cited there was

a great deal of conflicting evidence and the adverse decision was the result.

The cases of Healy v. Backus, 209 Fed. 200, and Marshall v. Backus, 213 Fed. 123, were subsequently appealed to the United States Supreme Court and were there dismissed in favor of appellants.

In the instant case there was no evidence introduced that these appellants would become public charges and how the Department of Labor arrived at that conclusion is a mystery. The aliens whom the Government are seeking to deport are subjects of Great Britain. As such subjects, they are, under and by virtue of the existing treaties between the United States and Great Britain, entitled to all rights, privileges and immunities within the territory of the United States of subjects of the most favored nation. Within the rights, privileges and immunities thus guaranteed to them are included all rights, privileges and immunities which are accorded to immigrants from the most favored nation seeking admission to the United States. There are by such treaties assured to these aliens absolute immunity from discrimination of any nature whatsoever on account of race, color or religion.

The aliens have been ordered deported because the immigration officials have found that they are likely to become public charges, but there can be no reasonable doubt, that the conclusion is based on prejudice and the opinion of the Court below in the

case of Healy v. Backus, supra, aptly expresses the situation when it finds that,

> "The finding that they were persons likely to become a public charge is based in reality, however much the immigration officers may disclaim the fact, upon the general showing and implied finding that there is a prejudice against the Hindu."

The proof upon which the order of deportation was based in the case of Healy v. Backus, supra, consisted of affidavits procured by the government in different parts of California, tending to show that immigrants from India are obnoxious and there exists a prejudice against them. In the instant case there is no proof whatever and is purely a figment of the imagination of the inspector and is not based upon substantial evidence. As heretofore stated, the Government confessed error on this point in the cases of Healy v. Backus, 209 Fed. 200; Marshall v. Backus, 213 Fed. 123, when those cases were appealed to the United States Supreme Court and the cases were accordingly dismissed. If that were true in those cases with what greater force should it not apply to the instant case where there is no foundation for the charge at all. These men are experienced mill-men and are never out of employment. There is no question as to the aliens being sound both physically and mentally and of a high type of mill-men whom employers are only too glad to engage. That they have passed inspection once and were duly admitted to the United States makes a proceeding, wherein it is alleged and with-

out any evidence to support it, that they stepped across the Canadian border line and therefore must be returned to India appear ridiculous.

Our contention also is that the order of deportation should have directed that the aliens be deported to Canada instead of India for the same reasons as set forth in the companion case of Dhanna Singh v. The United States, Number 2861; and in that respect it is illegal.

Because there was no evidence introduced on which to base an order of deportation we respectfully request that the order of the District Court denying the issuance of a writ of habeas corpus be reversed and the aliens be discharged.

Dated, San Francisco,
April 9, 1917.

JOSEPH P. FALLON,
Attorney for Appellants.

No. 2860

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUJAR SINGH and INDER SINGH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellee.

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Filed this.....day of April, 1917.

FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.

No. 2860.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GUJAR SINGH and INDER SINGH,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The appellants in the above entitled cause entered the United States in the years 1907 and 1909, respectively. Thereafter, on or about the month of April, 1915, said appellants entered the United States from Canada and were arrested on a warrant issued by the Secretary of Labor on the 22nd day of April, 1915. After the arrest of said appellants and a hearing had before the Immigration officials, and deportation ordered by said officials, a petition for writ of habeas corpus was filed on behalf on said appellants, said appellants taking the position

in said petition that the Government officials were restraining said appellants unlawfully.

To this petition the Government filed a demurrer and at the time of the hearing of said demurrer, the record of the Bureau of Immigration which contained all of the proceedings taken in appellant's case was introduced on behalf of the Government and considered upon the hearing of said demurrer as a part of the petition filed on behalf of appellants. Therefore, in determining the question now before the Court, the said record of the Bureau of Immigration is to be taken into consideration.

ASSIGNMENT OF ERRORS.

I.

The Court erred in denying a Writ of Habeas Corpus.

II.

The Court erred in dismissing said petition for a Writ of Habeas Corpus.

III.

The Court erred in not granting a Writ of Habeas Corpus.

IV.

The Court erred in holding that there was sufficient or any evidence presented to the Secretary of

Labor, to give him the right or authority to issue a warrant of deportation against said Gujar Singh and Inder Singh.

V.

The Court erred in holding that the matters alleged in the petition for a Writ of Habeas Corpus did not show that said Gujar Singh and Inder Singh did not have a full and fair hearing before the Commissioner of Immigration and the Immigration Inspectors acting under said Commissioner and the Secretary of Labor.

VI.

The Court erred in holding that the said Commissioner of Immigration and the Immigration Inspector acting under said Commissioner and the Secretary of Labor did not totally and wholly disregard the testimony presented by said applicant and his witnesses.

VII.

The Court erred in not holding that said Gujar Singh and Inder Singh had been unfairly examined owing to the prejudicial conduct of said Immigration officials.

VIII.

The Court erred in not holding that the said Gujar Singh and Inder Singh are restrained of their liberty without due process of law.

IX.

The Court erred in not holding that the said Gujar Singh and Inder Singh were denied due process of law in this, that they are ordered deported without any fair hearing or any hearing, and are denied the legal protection of the law guaranteed by the constitution of Laws of the United States; by the treaty existing between the United States of America and Great Britain according to them the equal protection of law guaranteed to any subject of the most favored nation and also by the rules of regulation of the Department of Labor now and then enforced.

ARGUMENT.

Although there are many errors assigned by appellants, there are but two questions involved in this case and this fact is recognized by said appellants in their opening brief.

The first question is whether or not said appellants entered the United States from the Dominion of Canada a short time prior to their arrest, and secondly, whether or not they were ordered deported to India.

In order to correctly understand the situation under which appellants were ordered deported, it is necessary to give a careful review of portions of the record of the Bureau of Immigration, and with this object in view, the Government first directs at-

tention to the memorandum for the use of the Assistant Secretary, and which was later approved by the Assistant Secretary of Labor, found on page 62 of the Immigration record, and which is as follows:

> "The attached record concerns five Hindoo aliens who admitted at the preliminary examination that they had entered from Canada on or about the dates above given, without inspection. They were discovered riding together in a box car at Sandpoint, Idaho. The two first named said they entered the United States in the years 1907 and 1909, respectively, and at the hearing under the warrant of arrest they denied that they had ever been in Canada. Their testimony at the preliminary hearing, however, shows clearly that they came from Canada and is entitled to greater weight than that subsequently given. Moreover the wearing apparel of the two men and various documents in their possession indicate that they have been in Canada recently. The other three men said they have resided in Canada for more than three years and have never lived in the United States. For this reason their return to that country should be permitted by the Canadian authorities. Commissioner Clark points out, however, that the investigation required by the Canadian Government before permitting the return of Hindoo aliens may consume considerable time and he questions whether it would not be advisable to deport the aliens at once to India. With respect to the two who assert a prior residence in this country there seems to be no doubt that they would have to be deported

to India, inasmuch as Canada will in all probability refuse to receive them.

The Bureau concurs in the recommendation that warrant of deportation ISSUE on the grounds stated in the warrants of arrest—that aliens entered without inspection and were at that time persons likely to become public charges—and that the two first named be deported to India at once at the expense of the Government. It believes the other three should be deported to Canada if possible and so recommends. A. H., Acting Commissioner-General.

Approved: (Signed) LOUIS F. POST,
Asst. Secretary."

Also to extracts of a memorandum filed for use of the Commissioner General of Immigration, found on pages 60 and 61 of the said Immigration record as follows:

"The said Gudja Singh, aged 38, single, farm laborer, native of India, Hindu race, landed at San Francisco, Cal., on or about October, 1907. Alien denies ever having been in Canada, but has papers in his possession which appear to prove conclusively that he has resided there, and in his preliminary hearing, he admits that he last entered the United States at Gateway, Mont., on April 16th, 1915, coming from Waldo, B. C. The examining officer states that he is one of five Hindus taken from a Great Northern box car at Sandpoint, Idaho, on the morning of April 22nd, 1915, at 1:00 A. M.; that he is wearing shoes made in Ontario; wears a cap

with a London trade mark; has Canadian bills, and, as previously stated, has papers executed in Canada. At time of entry alien had but $6.50 in his possession. * * *

Said Inder Singh, aged 27, single, farm laborer, a native of India, Hindu race, claims to have landed at San Francisco, Cal., in 1909, ex. steamship unknown, and entered the United States by walking across the border near Gateway, Montana, on or about April 20th, 1915, having in his possession only $2.00. While alien admits the foregoing concerning his last entry to the United States in his preliminary hearing, he denies having been in Canada in the formal hearing accorded him. This alien appears to be very untruthful and it is believed that the statement made by him when first questioned is the true one."

When this matter was first called to the attention of the Immigration officials, a statement was taken from one of said appellants, namely: Gujar Singh, which appears on pages 14 and 15 of said Immigration record, as follows:

"Q. What is your full and correct name?

"A. Gudja Singh.

"Q. How old are you?

"A. 38 years old.

"Q. Are you married or single?

"A. I am single.

"Q. What kind of work do you do?

"A. Farm labor. I am a farm laborer.

"Q. Do you read and write?

"A. Yes in the Hindu language.

"Q. Where were you born?

"A. Wudala, Punjeb, India.

"Q. Of what country are you a citizen?

"A. India.

"Q. Of what race are you?

"A. East Indian Race.

"Q. Where did you land when you first came from India?

"A. San Francisco, California.

"Q. Give the date?

"A. About October 1907.

"Q. Give the name of the steamship on which you came?

"A. I do not know the name of the ship. It was a big white boat. Only twenty Hindu men came on that boat.

"Q. Where did you enter the United States when you came from Canada?

"A. At Gateway, Montana.

"Q. Give the date?

"A. April 16, 1915.

"Q. Did you see an Inspector when you crossed at Gateway?

"A. No.

"Q. What time was it when you crossed the border?

"A. About 6.00 P. M.

"Q. Did you come alone?

"A. Yes.

"Q. Why did you not report to the Customs and Immigration Officers?

"A. I did not see them. I was looking for work, and just came across.

"Q. How much money did you have when you entered the United States?

"A. About $6.50.

"Q. From what town in Canada did you come?

"A. Waldo, B. C."

After said statement was taken an application for a warrant of arrest, under Sections 20 and 21 of the Act of February 20, 1907, was made, which application appears on page 13 of said record. In said application it is stated that from the sworn statements of said aliens, it appears

> "That they are all aliens, viz., citizens of India;
> That they all entered the United States on foot from Canada at the Port of Gateway, Montana, on or about April 19, 1915;
> That all entered without inspection;
> That all were at time of entry persons likely to become a public charge."

Following the first statement referred to herein made by the said Gujar Singh, it will be noted that he repudiated the admissions made in said statement (pages 53, 54 and 55 of the Immigration record), but the evidence found on the person of the said Gujar Singh would indicate that his first statement was true and that he entered the United States from the Dominion of Canada as stated therein.

A record was found in his person at the time of the arrest, a copy of which is set forth on page 51 of the record of the Bureau of Immigration, as follows:

"Gudja Singh (Exhibit "C")

(Office copy)

Victoria Registry,
Nov. 24th, 1914,
Ex'd by V. Y. (Seal)

JUDGMENT BY DEFAUT FOR PLAINTIFF,

Liquidated Demand.

No. of Plaint. 1160
140

IN THE COUNTY OF VICTORIA,
Holden at Victoria,

BETWEEN Gajas Singh, Plaintiff,
and
Harabut Singh, Defendant,

the 28th day of Sept., 1914.

The defendant not having entered a dispute note it is this day adjudged that the plaintiff recover against the defendant $24.40 and $9.05 costs, amounting together to the sum of $33.45.

BY THE COURT

Harvey Combe, Registrar."

Also a recommendation was found in his possession which shows that it was given by a Company

operating at Fort Moody, British Columbia. This record is found on page 50 of the record of Immigration.

The statement obtained from Inder Singh, which appears upon page 6 of the said record of the Bureau of Immigration also shows that he entered the Canadian border into the United States without inspection on April 20, 1915, prior to his arrest.

On page 52 of the record of the Bureau of Immigration is found a statement by Immigrant Inspector Obed S. Davis, made following the examination of said appellants, and which is as follows:

> "The above alien Gudja Singh is one of five Hindus taken from a Great Northern box car at Sandpoint, Idaho, on the morning of April 22, 1915, at 1.00 A. M. These aliens were all lying in the car together, occupying the same blankets, and when taken from the car was seemingly sober enough. This alien claims to have been drunk but when he was taken from the car he was sober enough. He first claimed that he was coming from Waldo, and that he entered the United States at Gateway, Montana, but later denies that he had been in Canada at all. He is wearing shoes made in Ontario, whereas a cap with a London mark, has Canadian bills, and carries papers written in Canada.
>
> He is coming at a time when there are no Hindus working in this part of the country, and there seems no excuse for his presence here except that he is trying to get out of Canada, and

to get among his countrymen in Oregon and California.

From the foregoing evidence, I Obed S. Davis, the duly authorized examining officer in the case, find the following facts:

That Gudja Singh, is an alien; a citizen of India;

That he entered the United States at Gateway, Montana, on or about April 16, 1915, walking across the border at night;

That his entry was deliberately surreptitious, and without inspection;

And that he was at the time of his entry to the United States a person likely to become a public charge, having but $6.50 in his possession.

I therfore recommend deportation.

(Signed) OBED S. DAVIS,
Immigrant Inspector."

Having gone into the facts of the case, the principal question to be determined is whether or not said appellants are subject to deportation, they having entered the United States from the Dominion of Canada without undergoing an inspection by the Government officials. This is no longer a mooted question.

Appellants' counsel also takes the position that the order of deportation should have directed that the aliens be deported to Canada instead of India,

but in answer to this contention, the Government directs attention to the following cases:

Lewis vs. *Frick,* 233 U. S. 291,

United States vs. *Reiz,* 203 Fed. 441.

In the case of *Lewis* vs. *Frick, Supra,* Justice Pitney, delivering the opinion, stated:

> "Petitioner is an alien and a native of Russia. He came thence to this country, entering at the Port of New York, in the month of September, 1904, lived in or near New York city until March, 1910, then removed to Detroit, Michigan, and has since made that city his home. On November 17, 1910, he crossed the river from Detroit to Windsor, Canada, and brought back with him into the United States a woman, avowed by him to be his wife, but whose actual status was questioned, as will appear. A few days later he was arrested upon a warrant from the Department of Commerce and Labor, issued under the immigration act of February 20, 1907 (34 Stat. at Large, 898, chap. 1134) as amended March 26, 1910 (36 Stat. at Large, 263, chap. 128, U. S. Comp. Stat. Supp. 1911, p. 501), and after a hearing conducted by an inspector, the Secretary, on February 14, 1911, found 'that said alien is a member of the excluded classes, in that he * * * * procured, imported, and brought into the United States a woman for an immoral purpose,' etc., and thereupon ordered that he be deported to the country whence he came, to wit, Russia. * * * *

Petitioner not having been convinced under par. 3, his destination is to be determined rather in the light of paragraphs 20, 21, and 35. And first, we take it to be clear (notwithstanding the peculiar phraseology of par. 20) that the three-year period limits only the authority to deport, and does not affect the determination of the country to which an alien is to be deported. Respecting this matter, the sections are somewhat lacking in clearness. But at least, par. 35 indicates a legislative intent that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports, if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country. This was recognized by Rule 38 of the Immigration Regulations, in force December 12, 1910.

It is to be noted that the classes of aliens who are subject to deportation are not wholly made up of those who enter in violation of the law; in some cases cause for deportation may arise after a lawful entry. And in many cases the unlawfulness of the entry may not be discovered until afterwards. The theory of the act, as expressed in par. 2, is that the undesirables ought to be excluded, at the sea port or at the frontier; but pars. 20, 21, and 35 recognize that this is not always practicable. Of course if petitioner's attempt to bring a woman into the country for an immoral purpose had been discovered in time, he might have been physically excluded from entry at Detroit upon his return from Windsor. In that event he would naturally have remained upon Canadian soil. But

since his offense was not discovered in time to permit of his physical exclusion, so that he becomes subject to the provisions for deportation, his destination ought not to be controlled by the facticious circumstances that he went into Canada to procure the prostitute. And, upon the whole, it seems to us that the act reasonably admits of his being returned to the land of his nativity, that being in fact 'the country whence he came' when he first entered the United States. See *Lavin* v. *Le Fevre,* 60 C. C. A. 425, 125 Fed. 693, 696; *Ex parte Hamaguchi,* 161 Fed. 185, 190; *Ex parte Wong You,* 176 Fed. 933, 940; *United States* vs. *Ruiz,* 121 C. C. A. 551, 203 Fed. 441, 444."

It will be noted on page 62 of the record of the Bureau of Immigration that in all probabilities the Canadian authorities would not accept said appellants in the event they were ordered deported there by the Immigration officials. The Government therefore submits that because of the fact that said appellants entered the United States from Canada surreptitiously and without examination or inspection by Government officials, that they are now subject to the order of deportation, as provided for in the said record of the Bureau of Immigration, and that India is the proper place to which they should be deported.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUM,
Asst. U. S. Attorney.

Attorneys for Appellee.

No. 2861

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DHANNA SINGH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

JOSEPH P. FALLON,
Attorney for Appellant.

Filed
APR 13 1917
F. D. Monckton,
Clerk.

Filed this.....day of April, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING COMPANY

No. 2861

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DHANNA SINGH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT.

Appellant appeals from the order and judgment of the lower Court sustaining the demurrer interposed to his petition for a writ of habeas corpus.

The alien came to this country in the year 1908, remaining here until the year 1913, when he left the United States and went to the City of Vancouver, British Columbia, where he purchased real property to the value of five thousand and 00/100 ($5000.00) dollars. On returning to the United States in the month of April, 1915, he was arrested charged with being in the country unlawfully, to wit:

1. Having entered the country without inspection.

2. That the alien was likely to become a public charge.

It is conceded that he entered the United States after due inspection in 1908, and remained therein until 1913, when he went to Canada and made an investment in some property in the City of Vancouver, British Columbia.

It is contended by the government that the fact that the detained was in Canada within three years of the time of his arrest started the running of the three-year statute anew, and any prior residence in the United States would not prevent his deportation.

Our contention is that while his sojourn in Canada may have started the running of the three-year statute anew the alien being a subject of Great Britain was entitled to deportation to Canada. The case of Frick v. Lewis, 233 U. S. 291, Lem Sing v. United States, 218 Fed. 432, in which it is held that an alien shall be deported to the country from which he originally came and in which he claims citizenship does not apply to the instant case. In the cases just cited the principals were subjects of Russia and China respectively, and were ordered returned to their respective countries; in the instant case the detained is a subject of Great Britain and came to the United States from the Dominion of Canada, a part of the British Empire, and as a subject of the British empire he should be returned to the country from whence he came, to wit, the British Dominion of Canada. If the deportation

of this alien is consummated according to the order of the Secretary of Labor a subject of Great Britain would be returned to an entirely different country of that empire from whence he came, and consequently is a violation of Section 20, of the Act of February 20,, 1907, of the Immigration Law, as amended by the Acts of March 26, 1910 and March 4, 1913. This alien states that he was not granted the privilege of counsel and that he was informed that counsel could be obtained at San Francisco, California; that on arriving at San Francisco he was informed for the first time that his case had been finally decided and that no further appeal was possible. During the whole proceeding he was without the advice or presence of counsel and being unfamiliar with the English language he was accredited with making statements that he never made.

As to the second ground for deportation, to wit, that he was likely to become a public charge, the reasons set forth in the brief filed in the companion case of Gujar Singh et al. v. The United States, Number 2860, would in this case have equal application.

We respectfully request that the order of the District Court denying the issuance of a writ of habeas corpus be reversed and that the writ of habeas corpus issue as prayed for.

Dated, San Francisco,
April 9, 1917.

JOSEPH P. FALLON,
Attorney for Appellant.

No. 2861

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DHANNA SINGH,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,
Attorneys for Appellee.

Filed this.....day of April, 1917.

FRANK D. MONCKTON, Clerk,

By.....Deputy Clerk.

Filed
APR 27 1917
F. D. Monckton
Clerk

NEAL PUBLISHING CO. PRINT, SAN FRANCISCO.

No. 2861.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

DHANNA SINGH,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

The statement set forth in the brief of counsel for appellant is substantially correct.

Appellant Dhanna Singh is an East Indian, a British subject, twenty-seven years of age and a laborer. He states that he landed at San Francisco, California, in 1908; that he visited Canada in 1912 for two weeks; that he again went to Canada in April 1914, and remained there until on or about March 1, 1915, when he reentered the United States surreptitiously with two other fellow countrymen.

It is stated in counsel's brief on page 2, that the Government concedes that the said appellant entered the United States after due inspection in 1908. In this particular, the facts set forth by appellant are incorrect. There is nothig in the record that would justify a concession of this kind.

Upon the re-entry into the United States by the said appellant, he was arrested upon a warrant emanating from the Secretary of Labor, charging him with having been found in the United States in violation of the Act of Congress approved February 20, 1907, amended by the Act approved March 26, 1910, for the following, among other reasons:

> "That they (other aliens having been arrested with the said appellant) were persons likely to become public charges at the time of their entry into the United States and that they entered without the inspection contemplated and required by said Act. (Section 20 and all sections requiring aliens to be inspected)".

Upon the arrest of appellant by the Immigration officers, said appellant petitioned for a writ of habeas corpus. To this petition the Government filed a demurrer and upon the hearing of this demurrer, the original record of the Bureau of Immigration was filed and made a part of the said petition for a writ of habeas corpus. The Court sustained the Government's demurrer to said petition, thus this appeal.

ASSIGNMENT OF ERRORS.

I.

The Court erred in denying a Writ of Habeas Corpus.

II.

The Court erred in dismissing said petition for a Writ of Habeas Corpus.

III.

The Court erred in not granting a Writ of Habeas Corpus.

IV.

The Court erred in holding that there was sufficient or any evidence presented to the Secretary of Labor, to give him the right or authority to issue a warrant of deportation against said Dhanna Singh.

V.

The Court erred in holding that the matters alleged in the petition for a Writ of Habeas Corpus did not show that said Dhanna Singh did not have a full and fair hearing before the Commissioner of Immigration and the Immigration Inspectors acting under said Commissioner and the Secretary of Labor.

VI.

The Court erred in holding that the said Commissioner of Immigration and the Immigration In-

spector acting under said Commissioner and the Secretary of Labor did not totally and wholly disregard the testimony presented by said applicant and his witnesses.

VII.

The Court erred in not holding that said Dhanna Singh had been unfairly examined owing to the prejudicial conduct of said Immigration officials.

VIII.

The Court erred in not holding that the said Dhanna Singh is restrained of his liberty without due process of law.

IX.

The Court erred in not holding that the said Dhanna Singh was denied due process of law in this, that he is ordered deported without any fair hearing or any hearing, and is denied the legal protection of the law guaranteed by the constitution and laws of the United States; by the treaty existing between the United States of America and Great Britain according to them the equal protection of law guaranted to any subject of the most favored nation and also by the rules of regulation of the Department of Labor now and then enforced.

ARGUMENT.

While counsel for appellant sets forth various assignments of error, there is but one material

question to be determined in this case and that is whether or not said appellant, having at one time been in the United States and deported into British Columbia, could subsequently re-enter the United States surreptitiously and without inspection, without being subject to deportation.

An examination of the record will show conclusively that the facts in this case are undisputed. In fact, the petitioner admits in his petition that he entered the United States over the Canadian border without inspection. The memorandum prepared for the Acting Secretary, which was prepared subsequent to the taking of the testimony in this case, is as follows:

"April 2, 1915.

Warrant.

In re DHANNA SINGH, GUDRIC SINGH, and JAGHAR SINGH; entered from Canada without inspection near Porthill, Idaho, on or about the first of March, 1915.

Memorandum for THE ACTING SECRETARY:

These Hindus were arrested at Walla Walla, Wash., under warrant of the 10th instant, on the grounds that they were persons likely to become public charges at the time of their entry and that they entered without inspection.

The letter attached herewith from the Commissioner of Immigration at Seattle sets forth fully and accurately the facts found in the rec-

ord of hearing. All three of the aliens admitted that they crossed the border from Canada without inspection and that they are without employment and have no prospects of same. Two of them are without funds, while the third, although having but a few dollars in his possession, claims that he has an interest in some real property in Canada. As stated by the Commissioner of Immigration at Seattle, Canada would probably permit of their return there if their entry could be verified, but that such verification is almost impossible. Moreover, by adopting the practice of returning these aliens to India, it would tend to some extent to discourage the efforts of members of this race to obtain illegal entry into the country.

It is therefore recommended that the above mentioned aliens be deported to India at Government expense, on the grounds set forth in the outstanding warrant.

It is quite probable that the alien Dhanna Singh is responsible for bringing his fellow countrymen across the border, but this cannot be clearly shown and the Bureau is of the opinion that action looking to his prosecution for violation of the penal section of the Immigration Act should not be instituted.

(Signed) ALFRED HAMPTON,
Acting Commissioner-General."

It is a well established principle in the Immigration Law that if an alien, after entering the United States, should leave the United States and enter a

foreign country, and again re-enter the United States from said foreign country, without inspection, that he can then be deported for such entry.

Ex parte Greaves, 222 Fed. 157,

Williams vs. *United States,* 186 Fed. 479,

Ex parte Li Dick, 176 Fed. 998,

Ex parte Hamaguchi, 161 Fed. 185,

and said order of deportation may be made at any time after the last entry into the United States by said alien providing said order is made before the expiration of the three years' period.

Siniscalchi vs. *Thomas,* 195 Fed. 701,

United States vs. *Uhl,* 211 Fed. 628,

Lewis vs. *Frick,* 233 U. S. 291.

Appellant's counsel also takes the position that the order of deportation should have directed that the aliens be deported to Canada instead of India, but in answer to this contention, the Government directs attention to the following cases:

Lewis vs. *Frick,* 233 U. S. 291,

United States vs. *Reiz,* 203 Fed. 441.

In the case of *Lewis* vs. *Frick, supra,* Justice Pitney, delivering the opinion, stated:

"Petitioner is an alien and a native of Russia. He came thence to this country, entering

at the Port of New York, in the month of September, 1904, lived in or near New York city until March, 1910, then removed to Detroit, Michigan, and has since made that city has home. On November 17, 1910, he crossed the river from Detroit to Windsor, Canada, and brought back with him into the United States a woman, avowed by him to be his wife. but whose actual status was questioned, as will appear. A few days later he was arrested upon a warrant from the Department of Commerce and Labor, issued under the immigration act of February 20, 1907 (34 Stat. at Large, 898, chap. 1134) as amended March 26, 1910 (36 Stat. at Large, 263, chap. 128, U. S. Comp. Stat. Supp. 1911, p. 501), and after a hearing conducted by an inspector, the Secretary, on February 14, 1911, found 'that said alien is a member of the excluded classes, in that he * * * * procured, imported, and brought into the United States a woman for an immoral purpose,' etc., and thereupon ordered that he be deported to the country whence he came, to wit, Russia. * * * *

Petitioner not having been convinced under par. 3, his destination is to be determined rather in the light of paragraphs 20, 21, and 35. And first, we take it to be clear (notwithstanding the peculiar phraseology of par. 20) that the three-year period limits only the authority to deport, and does not affect the determination of the country to which an alien is to be deported. Respecting this matter, the sections are somewhat lacking in clearness. But at least, par. 35 indicates a legislative intent that aliens subject

to deportation shall be taken to trans-Atlantic or trans-Pacific ports, if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country. This was recognized by Rule 38 of the Immigration Regulations, in force December 12, 1910.

It is to be noted that the classes of aliens who are subject to deportation are not wholly made up of those who enter in violation of the law; in some cases cause for deportation may arise after a lawful entry. And in many cases the unlawfulness of the entry may not be discovered until afterwards. The theory of the act, as expressed in par. 2, is that the undesirables ought to be excluded, at the sea port or at the frontier; but pars. 20, 21, and 35 recognize that this is not always practicable. Of course if petitioner's attempt to bring a woman into the country for an immoral purpose had been discovered in time, he might have been physically excluded from entry at Detroit upon his return from Windsor. In that event he would naturally have remained upon Canadian soil. But since his offense was not discovered in time to permit of his physical exclusion, so that he becomes subject to the provisions for deportation, his destination ought not to be controlled by the facticious circumstances that he went into Canada to procure the prostitute. And, upon the whole, it seems to us that the act reasonably admits of his being returned to the land of his nativity, that being in fact 'the country whence he came' when he first entered the United States. See *Lavin* v. *Le Fevre,* 60 C. C. A. 425,

125 Fed. 693, 696; *Ex parte Hamaguchi,* 161 Fed. 185, 190; *Ex parte Wong You,* 176 Fed. 933, 940; *United States* vs. *Ruiz,* 121 C. C. A. 551, 203 Fed. 441, 444."

It will be noted on page 47 of the record of the Bureau of Immigration that in all probabilities the Canadian authorities would not accept said appellant in the event he was ordered deported there by the Immigration officials. The Government therefore submits that because of the fact that said appellant entered the United States from Canada surreptitiously and without examination or inspection by Government officials, that he is now subject to the order of deportation, as provided for in the said record of the Bureau of Immigration, and that India is the proper place to which he should be deported.

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. U. S. Attorney.
Attorneys for Appellee.

No. 2868

United States

Circuit Court of Appeals

For the Ninth Circuit.

A. M. SHOOK, Trustee of the FARMERS DAIRY ASSOCIATION, a Corporation, Bankrupt,

Appellant,

vs.

A. LEVI,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed
JAN 18 1917
F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., San Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 2155.

In the Matter of FARMERS DAIRY ASSOCIATION, a Corporation, Bankrupt.

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States to A. Levi, Greetings:

You are hereby cited and admonished to appear in the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, on the 30th day of September, A. D. 1916, pursuant to the appeal duly obtained and filed in the clerk's office of the District Court of the United States for the Southern District of California, wherein you as objecting creditor are appellee, and A. M. Shook, Esq., Trustee of the Farmers Dairy Association, a Corporation, Bankrupt, is the appellant, to show cause if any there be, why the order and decree in said appeal mentioned should not be reversed and corrected, and why speedy justice should not be done to the parties in that behalf, and to do and receive that may appertain to justice to be done in the premises.

WITNESS the Honorable BENJAMIN F. BLEDSOE, United States Judge for the Southern District of California, on the 1st day of September,

in the year of our Lord, one thousand nine hundred and sixteen.

BLEDSOE,

United States Judge for the Southern District of Calif. [3*]

State of California,
County of San Diego,—ss.

G. W. Cobb, being duly sworn, deposes and says: That he is and was at the time of the service of the paper herein referred to a citizen of the United States, over the age of eighteen years, and not a party to the within entitled action; that he personally served the within Citation on Appeal, on the hereinafter named objecting creditor, and appellee, by delivering to and leaving with him personally, in the county of San Diego, State of California, at the time set opposite his name, a copy of said Citation on Appeal.

Name of party served: A. LEVI.

Time of service. Sept. 2, 1916. 10:45 A. M.

Fee for service $1.00.

Total: $1.00.

G. W. COBB.

Subscribed and sworn to before me this September 2, 1916.

[Seal] A. B. BOWMAN,

Notary Public in and for the County of San Diego, State of California. [4]

Copy of Within Citation on Appeal received and service accepted September 2, 1916.

*Page-number appearing at foot of page of original certified Transcript of Record.

[Endorsed]: 2155—Bkcy. In the District Court of the United States for the Southern District of California, Southern Division. In Bankruptcy—No. 2155. In the Matter of Farmers Dairy Association, a Corporation, Bankrupt. Citation on Appeal. Filed Sept. 2, 1916, at — min. past 9 o'clock, A. M. Wm. M. Van Dyke, Clerk. Leslie S. Colyer, Deputy.

Names and Addresses of Attorneys.

For A. M. SHOOK, Trustee of the Farmers Dairy Association, a Corporation, Bankrupt.

A. L. WISSBURG, Esq., Union Building, San Diego, California.

For ADOLPH LEVI:

JAMES E. O'KEEFE, Esq., San Diego, California. [5]

In the District Court of the United States of America in and for the Southern District of California, Southern Division.

IN BANKRUPTCY—NO. 2155.

In the Matter of the FARMERS DAIRY ASSOCIATION, a Corporation, Bankrupt. [6]

In the District Court of the United States in the Southern District of California, Southern Division.

IN BANKRUPTCY—NO. 2155.

In the Matter of FARMERS DAIRY ASSOCIATION, a Corporation, Bankrupt.

Petition in Reclamation.

Now comes Adolph Levi and respectfully represents to said Court as follows:

That your petitioner is a resident of the city of San Diego, State of California, and has been such for a number of years last past.

That said Farmers Dairy Association is a corporation, organized and existing under the laws of the State of California, with its principal place of business in the city of San Diego, said State, and for a year or more previous to the 22d day of July, A. D. 1915 was engaged in the sale of milk and its by-products, both wholesale and retail.

And on the 28th day of July, A. D. 1915, an involuntary petition in bankruptcy was filed in said court by certain of the creditors of said corporation. That on the 18th day of August, A. D. 1915, said Farmers Dairy Association, a corporation, was duly adjudicated bankrupt by said Court. That on the 7th day of September, A. D. 1915, the first meeting of the creditors was held in said proceeding.

And on said last mentioned date A. M. Shook was duly appointed trustee of said bankrupt and that said A. M. Shook is now the duly appointed, qualified and acting trustee of said Farmers Dairy Association, a corporation, bankrupt. [7]

That heretofore in the said city of San Diego and between the 6th day of July, A. D. 1914 and the 2d day of February, A. D. 1915, your petitioner, under a lease contract of sale, sold to said Bankrupt certain

personal property, to wit: Nine (9) horses, described as follows:

One Bay Mare, known as the Errica Mare, at the agreed price of ——.

1 Bay horse, known as the Errica horse, at an agreed price of ——.

1 Bay horse, known as the Mohnika horse, at an agreed price of ——.

1 Bay horse, known as the Reinbach horse, at an agreed price of ——.

1 Bay Mare, known as the Reinbach mare, at an agreed price of ——.

2 Bay Mares, known as the Danere mares, at an agreed price of ——.

1 Roan Mare, known as the Danere mare, at an agreed price of ——.

1 Bay Mare, known as the Ballantyne mare, at an agreed price of ——.

The total purchase price of said horses was to be the sum of $1035.00,

That all of said personal property was delivered to said bankrupt and that the same is now in the possession of said trustee. That under and by the terms of the provisions of the contract, agreeing to sell said horses to said Farmers Dairy Association, it was mutually understood and agreed between your petitioner and said Farmers Dairy Association that the title and ownership of said horses should remain in said petitioner until the total purchase price therefore was paid, to wit, $1035. That there has been paid on said purchase price the sum of $295 and that the balance remaining unpaid is the sum of $740.

That at the time of the agreement to sell said horses to said Farmers Dairy Association to evidence said indebtedness, notes, showing their indebtedness thereon, being hereto attached and are made a part of this petition. That said notes were not received in payment of the purchase price of said personal property, but were received only to [8] evidence said indebtedness, and it was mutually understood between the parties to said agreement that on the payment of said notes in the manner and at the time as provided therein your petitioner would sell to said association said horses and would deliver his Bill of Sale therefore, and that title to said property should at all times remain in said seller until said notes were paid.

That your petitioner is informed and believes that said trustee claims title and the right to possession to said property, asserting that the said Association is the owner thereof and for no other reason.

That petitioner also alleges that said trustee has in his possession four horses, the property of said petitioner, which horses are described as follows:

2 Gray horses and 2 Bay horses.

That said last four mentioned horses were rented and hired to said bankrupt on or about June 24th., A. D. 1915. That said horses are the property of your petitioner and that said bankrupt has no interest or ownership in or to said horses whatsoever. That before the filing of this petition, to wit, Septembe 7th, A. D. 1915, your petitioner demanded of said trustee the return of said four horses, but that said trustee has refused, and still refuses, to return the

same, and your petitioner is informed and believes that said trustee claims the right to possession of said horses, asserting that aid Farmer Dairy Association, a corporation, bankrupt, is the owner of said property.

WHEREFORE, your petitioner prays that said trustee be directed by this Court to forthwith deliver said nine head of horses to your petitioner, and that said trustee also be directed to deliver to your petitioner said four head of [9] horses described herein and for such other and further relief as may be just and proper in the premises.

Dated at San Diego, California, in said district this day of September, A. D. 1915.

ADOLPH LEVI,
Petitioner.

State of California,
County of San Diego,—ss.

On this 10th day of September, A. D. 1915, before me, came Adolph Levi, of the city of San Diego, California, said district, and made oath and said: That he has read the foregoing petition, consisting of three sheets of paper, and knows the contents thereof and that the statements and allegations made therein are true.

ADOLPH LEVI,
Petitioner.

Subscribed and sworn to before me at San Diego, Cal. in said district, this day of September, A. D. 1915.

[Seal] JAMES E. O'KEEFE,
Notary Public. [10]

$65.00 San Diego, California, July 6th, 1914.

One (1) year after date, without grace, for value received, we or either of us promise to pay to the order of Adolph Levi at San Diego, California, sixty-five and no/100 dollars, with interest at the rate of eight per cent per annum from date until paid, interest payable quarterly and if not so paid to be compounded quarterly and bear the same rate of interest as the principal; and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in Gold Coin of the United States. Should suit be commenced, or an attorney employed to enforce the payment of this note, we agree to pay an additional sum of ten per cent on principal and accrued interest, as attorney's fees in such suit.

Balance in full due on one (1) bay horse and one (1) bay mare.

FARMERS DAIRY ASS'N.
N. J. PEAVEY,
Pres.
GEO. M. KIMBALL,
Sec.

[Endorsed]: Oct. 10, 1914, Pd. Int. to /6/14–1.30 Jan 23, 1915, Pd. Int. to 1/6/15–1.30. Apr 23, 1915, Pd. Int. to 4/6/15–1.30. Filed this 14th day of Sept., 1915, at 45 minutes past 2 P. M. Edward T. Lannon, Referee in Bankruptcy.

$75.00 San Diego, California, Feb. 2, 1915.

One year after date, without grace, for value received, Farmers Dairy Ass'n. promise to pay to the

order of Adolph Levi at San Diego, Calif., seventy-five dollars with interest at the rate of 8 per cent per annum from date until paid, interest payable quarterly and if not so paid to be compounded as principal and bear the same rate of interest as the principal and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder [11] of this note. Principal and interest payable in Gold Coin of the United States. Should suit be commenced, or an attorney employed to enforce the payment of this note, we agree to pay an additional sum of 10 per cent on principal and accrued interest as attorney's fees in such suit.

[Documentary Stamp.]

FARMERS DAIRY ASSOCIATION.

[Seal] By N. J. PEAVEY,
Pres.

By H. STEPHENSON,
Secty.

[Endorsed]: Filed this 14th day of Sept. 1915, at 45 minutes past 2 P. M. Edward T. Lannon, Referee in Bankruptcy.

$50.00 San Diego, California, August 17th, 1914.

One (1) year after date, without grace, for value received, we promise to pay to the order of Adolph Levi at San Diego, California, Fifty and no/100 Dollars with interest at the rate of eight per cent per annum, from date until paid, interest payable quarterly and if not so paid to be compounded quarterly and bear the same rate of interest as the principal, and should the interest not be paid when due, then

the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States. Should suit be commenced, or an attorney employed to enforce the payment of this note, we agree to pay an additional sum of ten per cent on principal and accrued interest, as attorney's fees in such suit.

Balance in full for one bay mare and one bay horse, known as the Erreca mare and horse.

FARMERS DAIRY ASS'N

[Seal] By N. J. PEAVEY,
Pres.

L. A. SERRANO,
Sect. [12]

[Endorsed]: Dec. 11 1914. Pd. I. 11/17/14—1.00. Filed this 14th day of Sept., 1915, at 45 Minutes past 2 P. M. Edward T. Lannon, Referee in Bankruptcy.

$50.00. San Diego, California, August 17, 1914.

Nine (9) months after date, without grace, for value received, we promise to pay to the order of Adolph Levi at San Diego, California, fifty and no/100 dollars with interest at the rate of eight per cent per annum from date until paid, interest payable quarterly and if not so paid to be compounded quarterly and bear the same rate of interest as the principal; and should the interest not be paid when due, then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and

interest payable in gold coin of the United States. Should suit be commenced, or an attorney employed to enforce the payment of this note, we agree to pay an additional sum of ten per cent on principal and accrued interest, as attorney's fees in such suit.

FARMERS DAIRY ASSN.
N. J. PEAVEY,
Pres.
[Seal] L. A. SERRANO JR.,
Sect.

[Endorsed]: Dec. 11, 1914. Pd. Int. to 11/17/14 —1.00. Filed this 14th day of Sept. 1915, at 45 minutes past 2 P. M. Edward T. Lannon, Referee in Bankruptcy.

$375.00. San Diego, California, January 2d, 1915.

On or before one year after date, without grace, for value received, we promise to pay to the order of Adolph Levi at San Diego, California, three hundred seventy-five & no/100 dollars, with interest at the rate of 8 per cent per annum from date until paid, interest payable quarterly, and if not so paid to be compounded and bear the same rate of interest as the principal, and should the interest not be paid when due then the whole sum of principal and interest shall become immediately [13] due and payable at the option of the holder of this note. Principal and interest are payable in gold coin of the United States. Should suit be commenced, or an attorney employed to enforce the payment of this note, we agree to pay an additional sum of 10 per

cent on principal and accrued interest as attorney's fees in such suit.

FARMERS DAIRY ASSOCIATION.
By N. J. PEAVEY,
Prest.
[Seal] By H. STEPHENSON,
Secty.

[Endorsed]: (4 Documentary Stamps.) Apr. 23, 1915. Pd. Int. to 4/2/15—7.50. Filed this 14th day of Sept., 1915, at 45 minutes past 2 P. M. Edward T. Lannon, Referee in Bankruptcy.

$125/00 San Diego, California, Dec. 1st, 1914.

On or before six months after date, without grace, for value received, we promise to pay to the order of Adolph Levi at San Diego, Cal., one hundred and twenty-five dollars with interest at the rate of eight per cent per annum from date until paid, interest payable quarterly and if not so paid to be compounded as principal and bear the same rate of interest as the principal, and should the interest not be paid at maturity then the whole sum of principal and interest shall become immediately due and payable at the option of the holder of this note. Principal and interest payable in gold coin of the United States. Should suit be commenced or an attorney employed to enforce the payment of this note, we agree to pay an additional sum of 10 per cent on principal and ac-

crued interest, as attorney's fees in such suit.

FARMERS DAIRY ASSOCIATION.

By N. J. PEAVEY,

Prest.

[Seal] By H. STEPHENSON,

Secty. [14]

[Endorsed]: (2 Documentary Stamps.) April 9, 1915. Pd. Int. to 3/1/15—2.50. Filed this 14th day of Sept., 1915, at 45 minutes past 2 P. M. Edward T. Lannon, Referee in Bankruptcy.

[Endorsed]: 2155—Bankruptcy. In the District Court of the United States for the Southern District of California, Southern Division. In the Matter of Farmers Dairy Association, a Corporation, Bankrupt. Petition in Reclamation. Filed this 12th day of Sept. 1915, at 45 minutes past 2 P. M. Edward T. Lannon, Referee in Bankruptcy. James E. O'Keefe, Attorney for Petitioner, McNeece Building, San Diego, Cal. [15]

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 2155.

In the Matter of FARMERS DAIRY ASSOCIATION, a Corporation, Bankrupt.

Answer of A. M. Shook, Esq., Trustee, to Petition of Adolph Levi.

Comes now A. M. Shook, Esq., the duly elected, qualified and acting trustee of the estate of the above-

named bankrupt, and answers the petition of Adolph Levi, filed herein, as follows:

Said trustee denies that in the city of San Diego and between the 6th day of July, A. D. 1914, and the 2d day of February, 1915, the petitioner, Adolph Levi, sold the property mentioned and described in said petition of reclamation, filed herein, to the bankrupt, under a lease contract of sale. Upon information and belief, admits that the said property mentioned and described in said petition was delivered to said bankrupt by petitioner; denies that under and by the terms of the provisions of the contract that it was agreed between petitioner and the bankrupt that title and owner of said property mentioned and described in said petition was to be and remain in petitioner. That the Trustee herein is informed, and believes, and upon such information and belief alleges that said petitioner sold the property mentioned and described in said petition [16] to the bankrupt herein, outright, in payment of which the bankrupt gave certain promissory notes, which petitioner accepted in full payment of said debt. The Trustee admits that there is a certain amount due petitioner on said notes, but denies that title to said property should at all times remain in the seller until the notes are paid.

Wherefore, this trustee prays that the said petition be denied.

A. M. SHOOK,

Trustee of the Estate of Farmers Dairy Association, a Corporation, Bankrupt.

A. L. WISSBURG,

Attorney for Trustee.

Southern District of California,

County of San Diego,—ss.

A. M. Shook, being duly sworn, deposes and says that he is the person named as Trustee in the foregoing answer; that he knows the contents of same, and that same is true, except as to the matters herein stated on information and belief, and as to those matters he believes it to be true.

A. M. SHOOK.

Sworn to and subscribed before me this 13th day of September, A. D. 1915.

[Seal] H. R. VON BLOEKER,
Notary Public in and for the County of San Diego, State of California. [17]

[Endorsed]: In the District Court of the United States for the Southern District of California Southern Division. In the Matter of Farmers Dairy Association, a Corporation, Bankrupt. Answer of A. M. Shook, Trustee to Petition of Adolph Levi. A. L. Wissburg, Attorney for Trustee. Filed this 13th day of Sept., 1915, at 15 minutes past 4 P. M. Edward T. Lannon, Referee in Bankruptcy. [18]

In the District Court of the United States for the Southern District of California, Southern District.

IN BANKRUPTCY—No. 2155.

In the Matter of FARMERS DAIRY ASSOCIATION (a Corp.), Bankrupt.

Petition for Review.

To Edward T. Lannon, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That heretofore, on the —— day of September, 1915, he filed in said proceedings his petition in reclamation wherein he claims to be the owner of and entitled to the possesion of nine (9) certain head of horses that said petition was heard and on the 27th day of September, 1915, an order, a copy of which is hereto annexed, was made and entered herein.

That such order was and is erroneous in that,

First. That said order and the findings of said referee contained therein are against the weight of the evidence given at the hearing of said petition:

Second. That said referee erred in holding that the notes, executed and delivered to said claimant by said bankrupt, were in payment for said horses.

Third. That said Court erred in holding that said claimant did not reserve title to said horses, and said referee erred in holding that the giving of said notes were conclusive evidence that title to said personal property was not retained by the petitioner but that the giving of notes [19] by bankrupt was conclusive as to the payment for said horses;

Fourth. That the undisputed evidence given at said hearing discloses that your petitioner reserved title to said horses, that the contract relative to the sale of said horses was a verbal one, by the terms of which it was agreed that title to said property should remain in the vendor until the purchase price, which was evidenced by certain notes, was paid and that

said referee, under the undisputed evidence given at said hearing, erred in not so finding.

WHEREFORE, your petitioner, feeling aggrieved because of such order prays that the same may be reviewed, as provided in the bankruptcy law of 1898 and General Order XXVII.

Dated at San Diego, California, in said District, this day of October, 1915.

ADOLPH LEVI,
Petitioner.

State of California,
County of San Diego,
City of San Diego,—ss.

I, Adolph Levi, the petitioner mentioned and described in the foregoing petition, do hereby make solemn oath that the statements of fact therein contained are true, according to the best of my knowledge, information, and belief.

ADOLPH LEVI.

Subscribed and sworn to before me this 16th day of October, 1915.

[Seal] JAMES E. O'KEEFE,
Notary Public. [20]

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 2155.

In the Matter of FARMERS DAIRY ASSOCIATION, a Corporation, Bankrupt.

Order Denying and Dismissing Petition in Reclamation of Adolph Levi.

At a court of bankruptcy held at San Diego, Cal., in said District on the 23d day of September, A. D. 1915.

Before the Honorable, EDWARD T. LANNON, Referee in Bankruptcy, in said District.

Adolph Levi, having duly heretofore filed his petition in reclamation, praying leave to reclaim certain property, more particularly mentioned and described in said petition, upon the ground that said bankrupt, above named, purchased said property upon a conditional sale, and that the title to said property was to remain in said petitioner, until certain promissory notes given therefor, and at the time of said purchase, were fully paid, and also praying leave to reclaim four certain horses, mentioned and described in said petition, which said horses were rented to the said bankrupt.

And the above cause coming on for hearing before me on said day and evidence having been duly offered, J. E. O'Keefe, appearing as attorney for the petitioner, and A. L. Wissburg, appearing as attorney for the trustee, herein, and said evidence and the law having been duly considered. [21]

IT IS HEREBY ORDERED that the Petition in Reclamation of the said Adolph Levi, as to the property claimed to have been sold on conditional sale, be, and the same is hereby, dismissed and denied.

IT IS FURTHER ORDERED that the four horses mentioned and described in said petition, and

claimed by said petitioner to have been rented to said bankrupt, is the property of the Petitioner and the trustee in bankruptcy is hereby ordered to abandon the possesion of said four horses.

Dated San Diego, Cal., Sept. 27, 1915.

(Signed) EDWARD T. LANNON,
Referee in Bankruptcy. [22]

[Endorsed]: No. 6089. Dept. No. I. In the Superior Court of the State of California, County of San Diego. In the Matter of the Farmers Dairy Association (a Corp.), Bankrupt. Petition for Review. Filed Oct. 16, 1915. Edward T. Lannon. James E. O'Keefe, Attorney for Petitioner. [23]

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 2155.

In the Matter of FARMERS DAIRY ASOCIATION, a Corporation, Bankrupt.

Referee's Certificate on Review.

To the Honorable District Judge:

I, Edward T. Lannon, the Referee in Bankruptcy in charge of this proceeding, do hereby certify.

That in the course of such proceeding, an order, a copy of which is annexed to the petition hereinafter referred to, was made, and entered on the 27th day of September, A. D. 1915.

That on the 16th day of October, A. D. 1915, Adolph Levi, the petitioner in such proceedings, feeling ag-

grieved, thereat, filed a petition for review, which was granted.

That a summary of the evidence on which such order was based, is as follows:

The petition came on for hearing before said referee on the 23d day of September, A. D. 1915, J. E. O'Keefe, Esq., appearing as attorney for said petitioner, and A. L. Wissburg Esq., appearing as attorney for the trustee in said proceedings.

Mr. N. J. Peavy, called as a witness for petitioner, testified on direct examination, in substance, as follows:

That he, during the times mentioned in said petition was the [24] president of said Farmers Dairy Association, the bankrupt, and at certain times during said period, was Manager of said Farmers Dairy Association. That he had certain dealings with Mr. Levi, the petitioner, relative to the purchase of certain horses. That on or about the ——day of ——, 1915, witness had a conversation with petitioner at a ranch north of San Diego, relative to the purchase of said horses for said Farmers Dairy Association.That at this time the horses were inspected, Mr. L. A. Serrano, another officer of the corporation, was present at this time. Witness and petitioner negotiated for the sale of two of said horses at this time, which said horses were to be sold to the Farmers Dairy Association. Mr. Levi at this time states, and witness understood, that title to said horses were to remain in seller until the purchase price therefore had been paid. That this contract and understand-

ing was verbal. That promissory notes of the corporation representing the purchase price for said two horses were given by the corporation as was also understood between witness and petitioner, said notes being hereto attached.

That shortly thereafter, and on or about the —— day of ——, 1914, other and similar transactions were had between witness and petitioner, and said corporation secured two additional horses from petitioner, giving the corporation notes therefor.

That shortly thereafter, and on or about the —— day of ——, 1914, other and similar transactions were had between witness and petitioner, and said corporation secured five additional horses from petitioner, giving notes therefor. That at the time of this last transaction, Mr. H. Stephenson, was the secretary of said corporation.

That witness, petitioner and Mr. Serrano on one occasion went to the livery-stable of a Mr. Williams, in San Diego for the purpose of getting information concerning one of the horses in question, which had been traded by Mr. Powers, the then manager of said corporation; that petitioner at that [25] time told Mr. Williams that the horse in question belonged to him by virtue of the conditions of said sale.

That during the first part of July, 1915, witness entered into a certain contract with Mr. Schnell for the sale of the horses in question; that at this time, Mr. Levi, the petitioner, told Mr. Schnell of said contract of sale *by which* between witness and petitioner.

On cross-examination, witness states that the

understand and contract between himself and petitioner was verbal. That the matter of said purchases was brought to the attention of the board of directors of said corporation and they took action on same; that said corporation asserted indicia of ownership over said horses and used said horses in the business of said corporation. That said horses were carried on the books of the corporation as the property of said corporation, and monthly statements were gotten out by the corporation to the creditors, in which statements, said horses were carried as an asset of the corporation. That on each of the occasions, notes of the corporation, representing the purchase price of said horses were given, all which notes were introduced in evidence; that the notes representing the two first purchases of horses contain the words: "Balance in full for one bay mare and one bay horse, known as the Errica Mare and Horse" and "Balance in full due on one bay horse and one bay mare." That Mr. H. Stephenson was Secretary of said corporation at the time of the purchase of the last five horses and witness did not state that said horses were purchased on conditional sale, and did not state that title to said horses were to remain in seller until paid, nor was anything said to Mr. Stephenson concerning [26] any conditions under which the horses were purchased.

Mr. L. A. Serrano testified on direct examination that he was a member of the board of directors of said corporation, and at different times held other offices in said corporation. That he was present on one oc-

casion with Mr. Peavey had dealings with petitioner concerning the purchase of said horses, and petitioner stated that title to said horses were to remain in him until the purchase price was paid.

On cross-examination, witness states that this transaction and contract relating to the purchase of the horses was verbal. That the matter was brought to the attention of the board of directors of the corporation and they took action on it. That said corporation gave notes for the purchase price of said horses.

Mr. Geo. M. Kimball was called as a witness and testified on direct examination that he was a member of the board of directors of said corporation and for a short period of time was manager and secretary. That he was present on one occasion when Mr. Peavey had dealings with petitioner concerning the purchase of said horses and petitioner stated that title to said horses should remain in him until they were fully paid for.

On cross-examination witness stated that the contract was verbal; that the matter was brought to the attention of the board of directors of the corporation and they took action on it. That the corporation gave notes for the horses, assumed ownership of the horses and the horses were placed as an asset [27] of the corporation on the books of the corporation and also in the monthly statements sent to creditors by the corporation.

Mr. Adolph Levi, petitioner, testifying in his own behalf, states; that on each and all occasions in his dealings with Mr. Peavey relative to the sale of the

horses he stated that the title to the horses in question should remain in him until the purchase price was paid. That on 1915, he loaned the Farmers Dairy Association the sum of $1.000, for which the company gave its note, and also placed with him other notes of the corporation as collateral security for said loan. That certain officers and stockholders of the corporation endorsed said note. That he consented to the sale of said horses to Mr. Schnell, but it was understood with Mr. Peavey at the time that he should be paid the balance due on said horses. That on the —— day of ——, 1915, he called on Mr. Williams, the livery man of San Diego, for the purpose of locating a certain horse *with* the said Association had traded with Mr. Williams, and informed said Williams of the condition of the sale of said horses.

On cross-examination, Mr. Levi stated that the contract for sale of said horses was made with Mr. Peavey on behalf of the Farmers Dairy Association, and was verbal. That the Corporation took the horses and kept them in their charge; that he knew the corporation was carrying the horses on their books as an asset of the corporation; that promissory notes were given him by the corporation for the purchase price of said horses, and he accepted said notes; that title to said horses was not reserved in the notes, but that the notes were ordinary notes, due several months after date. [28]

Mr. Edgar Levi, son of petitioner, testified that he was present on one or more occasions when petitioner and Mr. Peavey had conversations relative to the pur-

chase of said horses, and his father stated that title to said horses were to remain in him until paid.

On cross-examination witness states that he prepared the notes given for the purchase price of said horses at the request of his father and said notes did not reserve the title to said horses in his father. That on the notes given for the purchase of the first four horses, he wrote therein the words: "Balance in full for one bay mare and one bay horse, known as the Enricca Mare and Horse" and "Balance in full on one bay horse and one bay mare."

Whereupon petitioner rested.

Mr. H. Stephenson was called as a witness and testified on behalf of the bankrupt estate, states that he was Secretary of the Farmers Dairy Association at the time of the purchase of the five last-named horses from Mr. Levi. That at said time, Mr. Peavey came to his office and stated to witness that he had purchased said horses from Mr. Levi and the company would have to give notes therefor, and Mr. Peavey requested witness to sign said notes as secretary. That Mr. Peavey did not state any condition attached to the sale of said horses, and witness considered that the notes were given in payment of the purchase price. That witness did not know, nor did Mr. Peavey tell him that the title to said horses was reserved in seller. That witness was also a member of the board of directors of said corporation and the board of directors took action on said matter.

The minutes of the board of directors of said corporation [29] was offered in evidence by the trustee, minutes dated July 20, 1915, and also the minutes

dated August 16, 1915; an excerpt of the minutes of July 20, relative to the purchase of said horses is as follows:

"It was moved by L. A. Seranno, seconded by W. E. Stewart and carried, that the matter of the purchase of two horses be purchased at $125 and $135 as follows: ½ due in six months, ¼ in nine months and the balance in one year."

An excerpt of the minutes of the board of directors of Farmers Dairy Association, a Corporation, of August 16, 1915, relative to the purchase of said horses is as follows: "It was moved by L. A. Seranno and seconded by W. E. Stewart that we purchase of Adolph Levi the two horses on the terms that the others were purchased."

The books of the corporation were also offered in evidence by the trustee, showing that said horses were kept on the books as an asset of the corporation.

The monthly statements gotten out by the corporation to the creditors were also offered in evidence, showing that said horses were carried there as an asset of the corporation.

The following voucher checks of the corporation were also offered in evidence, showing payment of notes by the corporation for the horses in question:

Voucher No.	Date	Name	Amt.
668	4/14/15	A. Levi	$35.10
449	1/22/15	"	188.63
385	12/11/14	"	54.35
230	10/ 7/14	" (int)	5.30
611	3/15/15	" "	2.50
669	4/18/15	"	66.50

That the question presented on this review is:

First. Did the petitioner, A. Levi, retain title to the horses in question by virtue of the alleged verbal contract?

Second. Did the bankrupt corporation purchase said [30] horses outright, or on conditional sale?

Third. Is petitioner, A. Levi, estopped from asserting title to said horses after accepting promissory notes of bankrupt in payment for said horses and receiving payment on certain other promissory notes given at the same time for said purchase?

Fourth. Are the promissory notes conclusively presumed to be given in payment of the debt?

Fifth. Is trustee's title paramount to title of vendor?

I hand up herewith for the information of the Judge the following papers:

1. Petition for Reclamation.
2. Answer of the Trustee.
3. Petition for review to which is attached a copy of the Referee's Order.

Dated Nov. 10th, 1915.

Respectfully submitted,

EDWARD T. LANNON,

Referee in Bankruptcy.

[Endorsed]: 2155—Bankruptcy. In the District Court of the United States for the Southern District of California Southern Division. In the Matter of The Farmers Dairy Asso., a Corporation, Bankrupt. Referee's Certificate on Review. Filed Nov. 11th, 1915. Edward T. Lannon, Referee. Filed Nov. 13,

1915, at 45 min. past 11 o'clock A. M. Wm. M. Van Dyke, Clerk. Murray C. White, Deputy. [31]

In the District Court of the United States, in and for the Southern District of California, Southern Division.

IN BANKRUPTCY—No. 2155.

In the Matter of FARMERS DAIRY ASOCIATION, a Corporation, Bankrupt.

Opinion.

Adolph Levi filed his petition "in reclamation" for an order for the return to him of certain horses held by the trustee and which he alleged had been sold to the bankrupt on conditional sale, title to remain in him till full purchase price was paid. The referee, after hearing, ordered that said petition be "dismissed and denied." A review by the judge was sought.

The referee's certificate on review contained merely a summary of the evidence on which his order was based, and showed that one Peavey, called in behalf of petitioner, testified that he, during the times mentioned in said petition, was the President of said Farmers Dairy Association, the bankrupt, and "at certain times during said period was manager of said Farmers Dairy Association"; that he had certain dealings with the petitioner relative to the purchase of certain horses; that "on or about the —— day of ——, 1915," witness had a conversation with petitioner relative to the purchase of said horses, for the

Association, another official of the Association being present. Witness and petitioner negotiated for the sale of said horses and witness understood that title to said horses was to remain in the seller until the purchase price therefor had been paid. The contract and the understanding **[32]** were verbal: The promissory notes of corporation representing the purchase price were given by the corporation as was understood by witness and petitioner should be done. Other transactions involving other horses and, under similar circumstances were also had between petitioner and the witness.

The witness also testified "that the matter of said purchase was brought to the attention of the board of directors of said corporation and they took action on same; that said corporation asserted indicia of ownership over said horses and used said horses in the business of said corporation. That said horses were carried on the books of corporation as the property of said corporation, and monthly statements were gotten out by the corporation to the creditors, in which statements, said horses were carried as an asset of the corporation."

Witness further testified that one Stephenson was the secretary of the corporation at the time of the purchase of the last five horses, and witness did not state the horses were purchased on conditional sale, and did not state that title to said horses was to remain in seller until paid, nor was anything said to Mr. Stephenson concerning any conditions under which the horses were purchased. Other evidence of similar import, given by other persons, was also set

out in summary way in the certificate of the referee.

The secretary of the corporation was called and testified that he was informed by Mr. Peavey, the president, that he had purchased certain horses from the petitioner and that the company would have to give its notes therefor; that no statement was made as to any condition attached to the sale of the horses, and that witness considered that the notes were given in payment of the purchase price. "That witness **[33]** did not know, nor did Mr. Peavey tell him that the title to said horses was reserved in the seller; that witness was also a member of the board of directors of said corporation, and the board of directors took action on said matter." The only action shown by the certificate to have been taken by the board of directors was an excerpt copied from the minutes of the corporation, which excerpt in substance set forth that it was regularly moved and seconded that the horses in question "be purchased" at a certain price and on certain terms with respect to the time of payment specified.

It was also shown by the books of the corporation that the horses were entered on the books as an asset and that statements were issued showing this fact.

The promissory notes given by the corporation were in ordinary form and contained no statement or intention of any "conditional sale."

JAMES E. O'KEEFE, Attorney for Petitioner.

A. L. WISSBURG, Attorney for Trustee.

BLEDSOE, District Judge (after stating the facts as above).

In this case, from the certificate sent up by the

referee, it is impossible to determine the reasons which actuated him in arriving at the conclusion as to which a review is sought, and which resulted in the conclusion complained of. The order entered by the referee is merely to the effect that the petition of reclamation filed by the petitioner Levi is dismissed and denied. The Court is not advised therefore of the findings of fact and conclusions of law, if any, arrived at by the referee.

In a proceeding of this character respecting ownership and title to property, the law of the State wherein such property is situate controls. In California, it may be considered as **[34]** established that in a contract of sale such as was relied upon by petitioner herein, the title to chattels sold may be retained by the seller pending full payment of the purchase price, or the performance of any other conditions named by him. This reservation of title by the seller is good as against creditors and consequently as against the trustee in bankruptcy of the buyer. Perkins v. Mettler, 126 Cal. 100; Van Allen v. Francis, 123 Cal. 474. The contract may be verbal unless some local statute requires otherwise; Blackwell v. Walker, 5 Fed. 419. No such statute of California has been called to my attention. The assumption of a positive obligation by the buyer to pay the purchase price does not in itself serve to change a sale which otherwise would be conditional into an absolute one. Neither is it to be assumed by the Court, in the light of present-day business transactions that the giving of a promissory note is to be considered as payment and complete satisfaction in itself of the

obligation therein represented and thereby ordinarily sought to be evidenced. In other words, in the absence of any contrary proof, the Court, in accordance with usual business procedure, must assume that a promissory note is given as evidence of a debt owing, rather than as payment and satisfaction thereof.

Under the evidence in this case, therefore, if it were the fact that a contract was shown to exist as between the petitioner and the bankrupt corporation providing for the conditional sale of the horses mentioned in the petition and title was to vest only upon full payment therefor, it would follow that the petition should have been granted, and that the order made by the referee should be reversed in its entirety. There is a matter involved, however, which arises upon the record and which has impelled the Court to give to **[35]** the proceeding some consideration other than that suggested by arguments of counsel.

All the authorities seem to hold that in a proceeding of this sort the burden of proof rests upon him who claims the sale to have been conditional rather than absolute. In other words, upon the transfer of personal property and the receipt of promissory notes in payment therefor, the presumption ordinarily would be that an absolute sale was intended and had been effectuated.

The bankrupt in this case is a corporation and the petitioner must have shown a contract as between himself and the corporation, if he would sustain his claimed reservation of title. The record, which con-

sists merely of a summary of the evidence taken before the referee, obviously is very meager, but it does not, in my judgment, meet the burden imposed upon the petitioner. It fails to show that a contract was entered into between petitioner and the corporation. It does show that the petitioner had dealings with a Mr. Peavey, who was at said times the "president of the association," and was "at certain other times," but not necessarily at any times when sales of horses were being consummated, the "manager of the corporation," and that, in the sales which were made, verbal understandings were had that title to the respective horses was to be reserved by the petitioner until full payment of the purchase price. The mere fact that this arrangement was had with the president does not, in my judgment, under the authorities, serve to bind the corporation. Fontana v. Pacific Can Co., 129 Cal. 51. There is no suggestion anywhere in the record that the corporation itself was at any time, through its board of directors, or otherwise, apprised of the fact that a reservation of the title to the horses was a part of its contract. On the contrary, **[36]** as shown by the record, the contract of the corporation, as evidenced by the resolution of its board of directors, was that of an absolute sale.

There is no showing as to the number of directors of the corporation or as to the number who were informed even privately of the understanding had between the petitioner and the president, and no showing, therefore, that the board of directors or even a majority of the board, were advised of the fact of the

reservation of title, or at all consented to or acquiesced in the verbal agreement purporting to retain title to the horses in the petitioner until the full purchase price has been paid. In this connection it must be remembered that the referee has denied the petition and because of this fact all presumptions with respect to the want or sufficiency of evidence are in favor of the validity of his order, and the Court must not assume that evidence with respect to any matter was given which would be inconsistent with the conclusion reached by the referee, unless such evidence is succinctly set forth in the record brought to this Court.

It thus appears, as I view the case, that the petitioner attempted by verbal understanding had with the president of the corporation, who, in so far as the record shows, was unauthorized to bind the corporation, to retain title to his horses until the entire purchase price had been paid. In this he was unsuccessful, in so far as the actual negotiation of a contract was concerned, in that the president was not authorized, apparently, to bind the corporation in this respect. The purchase price not having been paid, it would not be proper, however, to hold, as did the referee, that the petitioner now be deprived of the title to his horses. He consented to no such arrangement, entered into no such contract, and the Court should not by its judgment decree that he did. **[37]**

It must be that as to the matter of the retention of the title to the animals there was no meeting of the minds sufficient to constitute a conditional sale contract and the rights of the parties will have to be de-

termined on some other basis.

Though this feature of the case has not been argued by, or presented in the briefs of counsel, it seems to me that under the circumstances the only fair and equitable thing to do is to hold that the petitioner is still the owner of the horses and that the bankrupt corporation is entitled to a return of so much of the purchase price as has been paid thereon, less such a sum, not to exceed in any event, the amount of the purchase price thus far paid, as will suffice to reimburse the petitioner for the reasonable value of the use of the horses during the time they were in the possession of the bankrupt and up to the date of the adjudication herein.

The order of the referee is therefore reversed and the matter remanded for further hearing by him. Upon such further hearing he will take evidence and determine the reasonable value of the use of the horses during the period mentioned and will make an order directing the trustee to return the horses to the petitioner upon the repayment by the petitioner of all sums of money received by him as part of the purchase price of the said horses in excess of the amount which he may be entitled to retain as the reasonable value of such use. Petitioner will also be directed to deliver up for cancellation the promissory notes received by him as evidence of the purchase price to be paid.

[Endorsed]: No. 2155. U. S. District Court, Southern District of California. In the Matter of Farmers Dairy Association, a Corporation, Bank-

rupt. Opinion. Filed May 29, 1916. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. **[38]**

United States District Court for the Southern District of California.

IN BANKRUPTCY.—No. 2155.

In the Matter of FARMERS DAIRY ASSOCIATION, a Corporation, Bankrupt.

Petition for Appeal to the Circuit Court of Appeals.

To the Honorable Judges of the United States District Court for the Southern District of California.

Your petitioner, A. M. Shook, Esq., Trustee of the above-entitled bankrupt estate, conceiving himself aggrieved by the certain order and judgment entered on the 29th day of May, A. D. 1916, in the above-entitled proceedings, reversing the order and judgment of Edward T. Lannon, Esq., Referee in Bankruptcy for the Southern District of California, Southern Division, at San Diego, California, does hereby petition for an appeal from the said order and judgment entered the 29th day of May, A. D. 1916, to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that his appeal may be allowed and that a citation may be granted, directed to Adolph Levi, Esq., claimant, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said proceedings duly authenticated, may

be transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

A. M. SHOOK,
Trustee in Bankruptcy of the Estate of Farmers Dairy Association, a Corporation.

By A. L. WISSBURG,
His Attorney.

The foregoing appeal is hereby allowed, this 1st day of July, A. D. 1916.

BLEDSOE,
United States District Judge.

[39]

[Endorsed]: No. 2155—Bkcy. United States District Court for the Southern District of California. In the Matter of Farmers Dairy Association, a Corporation, Bankrupt. In Bankruptcy. No. 2155. Petition for Appeal to the Circuit Court of Appeals, and Order Allowing. Filed Jul. 1, 1916, Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [40]

In the District Court of the United States for the Southern District of California, Southern Division.

IN BANKRUPTCY.—No. 2155.

In the Matter of FARMERS DAIRY ASSOCIATION, a Corporation, Bankrupt.

Assignment of Errors.

Now comes A. M. Shook, Esq., Trustee in Bankruptcy of the above-entitled bankrupt estate, appel-

lant, and files this, his assignment of errors, complaining as follows:

1. That the said order, decision and opinion of the District Court reversing and re-referring the matters in dispute to Edward T. Lannon, Esq., the referee in bankruptcy, for further hearing, was against the weight of the evidence.

2. That the Court in making said order, decision and opinion held that negotiable promissory notes given in payment of the purchase price for the horses in question, in the absence of any contrary proof must be assumed to be given as an evidence of indebtedness, rather than as payment and satisfaction thereof, whereas the evidence is conclusive, there being none to the contrary, that the notes so given were given in payment and satisfaction of the debt, and the notes themselves bear notations to this effect.

3. That the Court in making said order, decision and opinion disregarding the contentions of both the trustee in bankruptcy and the claimant in holding that no contract of any kind had been entered into, whereas all parties to the action admitted that there was a contract entered into between [41] claimant and the bankrupt, claimant contended the contract of sale was a conditional one, and the trustee contending the said contract of sale was absolute, and that under said contract the trustee was entitled to the possession of the horses in question as the property of the bankrupt corporation.

4. That the Court in making said order, decision and opinion disregarded the fact that the claimant had positive knowledge that bankrupt was regard-

ing said contract of sale as absolute; claimant acquiring said knowledge from statements of the business of bankrupt, and also from the books of bankrupt, said knowledge was also being communicated to creditors of bankrupt who extended credit on the strength of the statements of the bankrupt's business, and claimant failed to in any way assert his right or title to the horses in question until bankruptcy proceedings proper were commenced, this being all the evidence and there being none to the contrary, whereas, such being the case, claimant is, by his conduct, now estopped from asserting any title or claim to the property in dispute.

A. M. SHOOK,

Trustee in Bankruptcy of the Estate of Farmers Dairy Association, a Corporation, Bankrupt.

By A. L. WISSBURG,

His Attorney.

[Endorsed]: 2155—Bkcy. In the District Court of the United States in and for the Southern District of California, Southern Division. In Bankruptcy. No. 2155. In the Matter of Farmers Dairy Association, a Corporation. Bankrupt. Assignment of Errors. Filed Jul. 1, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. **[42]**

United States Circuit Court of Appeals, Ninth Circuit.

IN BANKRUPTCY.—No. 2155.

In the Matter of FARMERS DAIRY ASSOCIATION, a Corporation, Bankrupt.

Stipulation as to Record on Appeal.

WHEREAS, in the above-entitled proceeding the bankrupt, Farmers Dairy Association, a corporation, did on the 30th day of June, A. D. 1916, duly file in the District Court of the United States for the Southern District of California a petition for appeal and assignment of errors, and citation, which said appeal was allowed by order of the District Court upon said day, and the time to certify the record having been duly extended.

NOW, THEREFORE, it is hereby stipulated that the record to be certified to this court by the clerk of the United States District Court for the Southern District of California, on said appeal shall consist of the following:

1. Petition for Reclamation.
2. Answer of A. M. Shook, Esq., Trustee, to Petition of A. Levi.
3. Petition for Review to which is attached a copy of Referee's Order.
4. Referee's Certificate on Review.
5. Opinion of His Honor, B. F. Bledsoe, United States District Judge for the Southern District of Calif.

6. Petition for Appeal to the Circuit Court of Appeals.
7. Assignment of Errors.
8. Citation on Appeal.

Dated August 26th, 1916.

A. L. WISSBURG,
Attorney for Trustee, Appellant.
JAS. E. O'KEEFE,
Attorney for Creditor, Respondent.

[43]

[Endorsed]: 2155—Bkcy. United States District Court, Southern District California, Southern Division. In the Matter of Farmers Dairy Association, a Corporation. Bankrupt. Stipulation as to record on Appeal. Filed Sep. 2, 1916, at—min. past 9 o'clock A. M. Wm. M. VanDyke, Clerk. Leslie S. Colyer, Deputy. **[44]**

In the District Court of the United States of America, in and for the Southern District of California, Southern Division.

IN BANKRUPTCY.—No. 2155.

In the Matter of the FARMERS DAIRY ASSOCIATION, a Corporation, Bankrupt.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing forty-four typewritten pages, num-

bered from 1 to 44, inclusive, and comprised in one volume, to be a full, true and correct copy of the Petition in Reclamation, the Answer of A. M. Shook, Trustee, to Petition of Adolph Levi, the Petition for Review and Order denying and dismissing Petition in Reclamation of Adolph Levi, the Referee's Certificate on Review, the Opinion, the Petition for Appeal to the Circuit Court of Appeals, and Order Allowing, the Assignment of Errors, the Stipulation as to Record on Appeal, in the above and therein entitled matter, and that the same together constitute the record in said matter upon the Appeal of A. M. Shook, Trustee of the Farmers Dairy Association, a Corporation, Bankrupt, from the Order and Judgment entered on the 29th day of May, A. D. 1916, in said matter, as specified in the said Stipulation as to Record on Appeal, filed in my office on behalf of the appellant by its attorney of record. [45]

I do further certify that the cost of the foregoing record is $20.00, the amount whereof has been paid me on behalf of said A. M. Shook, Trustee of the Farmers Dairy Association, a Corporation, Bankrupt.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this 19th day of October, in the year of our Lord, one thousand nine hundred and sixteen and of

our Independence the one hundred and forty-first.

[Seal] WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [46]

[Endorsed]: No. 2868. United States Circuit Court of Appeals for the Ninth Circuit. A. M. Shook, Trustee of the Farmers Dairy Association, a Corporation, Bankrupt, Appellant, vs. A. Levi, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

Filed October 21, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

(2115—BKCY.)

A. M. SHOOK, Trustee in Bankruptcy of the Estate of FARMERS DAIRY ASSOCIATION, a Bankrupt,

Appellant,

vs.

A. LEVI,

Appellee.

Order Extending Time to and Including October 30, 1916, to File Record and Docket Cause.

Good cause appearing therefor, it is hereby ordered that the time of appellant within which to file record and docket cause in the above-entitled court be and the same hereby is extended to and including the 30 day of October, 1916.

Dated Sept. 25, 1916.

BLEDSOE,
Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals, for the Ninth Circuit. A. M. Shook, Trustee in Bankruptcy of Farmers Dairy Association, a Bankrupt, Appellant, vs. A. Levi, Appellee. Order Extending Time to File Record and Docket Cause.

No. 2868. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to October 30, 1916, to File Record thereof and to Docket Case. Filed Oct. 2, 1916. F. D. Monckton, Clerk. Refiled October 21, 1916. F. D. Monckton, Clerk.

No. 2868

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. M. SHOOK, Trustee of the Estate of FARMERS DAIRY ASSOCIATION, a corporation. Bankrupt.
Appellant.

vs.

A. LEVI,
Appellee.

Brief of Plaintiff, Appellant

A. L. WISSBURG,
Attorney for Appellant

Filed this.....day of January, 1917

FRANK D. MONCKTON, Clerk

By.....*Deputy*

Filed

FRYE & SMITH, PRINTERS, San Diego, Cal.

JAN 26 1917

F. D. Monckton,
Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

A. M. SHOOK, Trustee of the Estate of FARMERS DAIRY ASSOCIATION, a corporation. Bankrupt.

Appellant.

vs.

A. LEVI,

Appellee.

Brief of Plaintiff, Appellant

STATEMENT

This is an appeal from an Order and Judgment of the United States District Court for the Southern District of California, Hon. B. F. Bledsoe, Judge, reversing and setting aside an Order and Judgment of the Referee in Bankruptcy of the United States District Court for the Southern District of California, Southern Division, Hon. E. T. Lannon, Referee, which said Order and Judgment was made and entered by said Referee on the 27th day of September, A. D. 1915.

The facts disclosed by the record, briefly stated, are: That on the 28th day of July, A. D. 1915, an involuntary petition in bankruptcy was filed in the United States District Court for the Southern District of California, Southern Division, by certain creditors of the Farmers

Dairy Association, a corporation, alleging said corporation to be insolvent and unable to meet its obligations; that on the 18th day of August, A. D. 1915, said Farmers Dairy Association, a corporation, was duly adjudicated a bankrupt. That on the 7th day of September, A. D. 1915, A. M. Shook, Esq., Appellant herein, was duly appointed the Trustee of said bankrupt estate, and on said date qualified as such Trustee and has been since said date, and now is, the duly appointed, qualified and acting Trustee of said bankrupt estate.

That on the 12th day of September, A. D. 1915, the petitioner, A. Levi, Appellee herein, filed a petition in reclamation in said proceeding, which said petition is duly set forth in the record herein; that said petition in reclamation came on for hearing before Hon. E. T. Lannon, Referee, on the 23rd day of September, A. D. 1915, evidence being received therein, and on the 27th day of September, A. D. 1915, the Referee made an order and rendered a judgment denying the petition of said Levi, and dismissing same.

The facts disclosed by the record and the Referee's certificate on review to the United States District Court, briefly stated, are: That on the day of..... A. D. 1914, petitioner, A. Levi, sold to the bankrupt Corporation, two certain horses, and on the day of, A. D. 1914 petitioner sold said bankrupt Corporation two additional horses; and on the day of, A. D. 1914, petitioner sold said bankrupt Corporation five additional horses; that said sale of horses was made by petitioner to the bankrupt Corporation through its President, Mr. N. J. Peavey; that each of said sales were verbal, no written

instrument whatever passing between the parties, and, according to the evidence, it was *verbally* understood between petitioner and said Peavey that the title to said horses should remain in the vendor until the purchase price was paid; that on the 20th day of July, A. D. 1915, which was shortly after the incident above referred to, relating to the first purchase of horses, the matter of the purchase of the horses was brought to the attention of the board of directors of said Corporation, at its regular meeting. The minutes of said meeting, which were introduced in evidence by the Trustee, recite the following with reference to said first purchase of horses:

> "It was moved by L. A. Serrano, seconded by W. E. Stewart, and carried, that the matter of the purchase of two horses be purchased at $125.00 and $135.00 as follows: ½ due in six months, ¼ in nine months and the balance in one year."

That on the 16th day of August A. D. 1915, which was shortly after the incident above referred to, relating to the second purchase of horses, the matter of the purchase of the horses was brought to the attention of the board of directors of the bankrupt Corporation, at its regular meeting. The minutes of said meeting, which were introduced in evidence by the Trustee, recite the following with reference to the second purchase of horses:

> "It was moved by L. A. Serrano and seconded by W. E. Stewart that we purchase of Adolph Levi the two horses on the terms that the others were purchased."

That immediately after the passage of the above resolutions, the Corporation, through its proper officers, and

pursuant to said resolutions, executed its negotiable, promissory notes to petitioner, A. Levi, in payment for said horses; that, according to the evidence of petitioner, and Mr. Peavy, said notes represented the purchase price of said horses, and were received and accepted by said Levi in *payment* for said horses; that the notes did not reserve the title to the said horses in the vendor; that in the body of two of the notes, which were the last notes representing each transaction, were inserted by Mr. Edgar Levi, son of petitioner, the following words:

> "Balance in full for one Bay Mare and one Bay Horse known as the Enricca Mare and Horse", and "Balance in full for one Bay mare and one Bay horse."

That each and all of the notes so given in payment for said horses were in the possession of, and the property of, A. Levi, petitioner, at the time of the adjudication in bankruptcy of said Corporation.

That, according to the evidence, Mr. H. Stephenson, was Secretary of the Corporation at the time of the purchase of the last five horses; that notes, representing the purchase price for same were presented to him at the time of said purchase; that said notes were negotiable promissory notes, and he signed said notes as Secretary; that at the time said notes were presented to him for signature, and at no time since, was he informed that title to said horses was reserved in the vendor, nor were any conditions which may have been attached to the sale of said horses made known to him, but he understood that the notes so signed by him as Secretary were to be given by the Corporation, and accepted by the vendor, in payment of the purchase price for said horses.

The evidence further discloses the fact that the Corporation carried all of said horses on their books as an asset of the Corporation; that monthly statements of the business of the Corporation had been gotten out by the Corporation for the benefit and information of its creditors; that credit was extended to the Corporation on the strength of its financial statements; that said horses were carried in said financial statements as an asset of the Corporation; that the petitioner, A. Levi, had received such statements, and from said statements knew the condition of the Corporation, and knew that the Corporation were claiming said horses as an asset, and that petitioner, at no time prior to the bankrupt's adjudication, according to the evidence, asserted in any way, his right or title to said horses; that said Corporation kept said horses in charge from the time of their purchase up to the time of the adjudication and at all times exercised indicia of ownership over said horses; that said Corporation had made several payments on the notes so held by Levi, representing the purchase price of said horses, and said payments were endorsed as credits on said notes.

The books of the Corporation, and the monthly financial statements of the Corporation were offered in evidence by the Trustee, which showed that said horses were therein carried as an asset of the Corporation. Vouchers showing payment on the notes to A. Levi were also introduced in evidence.

From the above statement of facts, which is in accord with the Referee's Certificate on Review to the United States District Court, the Referee held that, so far as the Corporation itself and the creditors of the Corpora-

tion were concerned, the sale of said horses to the Corporation was absolute; that title to said horses vested in the Trustee for the benefit of the creditors of the bankrupt Corporation; that the contract between petitioner, A. Levi, Appellee herein, and Mr. Peavey, if such a contract existed, was not one of conditional sale as would bind the Corporation and its creditors, and the Referee, after considering the facts and the law denied the petition of Mr. Levi, and dismissed same.

On review of said proceedings by the United States District Court for the Southern District of California, Hon. B. F. Bledsoe, Judge, an opinion was rendered by said Court and filed on May 29th, 1916, determining the issues between the Trustee herein, and petitioner, A. Levi, upon a basis not contemplated by either of the parties connected with said proceedings, or their attorneys, and upon a theory foreign to and entirely without the scope of the evidence—Mr. Levi, according to his petition in Reclamation admitting there was a sale of the horses, but contending that such sale was a conditional one—the Trustee contending that from the facts and circumstances, and all the facts and circumstances, said sale of horses was absolute to the Corporation, and said property should be held by the Corporation and for the benefit of its creditors.

ARGUMENT.

A. THE COURT ERRED IN RENDERING A DECISION CONTRARY TO THE WEIGHT OF THE EVIDENCE.

The Appellant, herein, to sustain his assignment of error in this connection relies upon the Referee's Cer-

tificate on Review to the United States District Court, which is a part of the Record herein, and which contains a summary of the evidence, to which the attention of this Court is respectfully referred. Under no theory of the case, as was submitted by counsel representing the contesting parties, nor under the evidence itself, could the United States District Court hold that there was no contract of sale whatsoever, which seemed to have been the Court's reasoning herein, for however liberal the Court wished to be with petitioner, Appellee herein, it cannot disregard his own Petition in Reclamation, which is a part of the record herein, in which petitioner admits a sale of the horses in question to the Bankrupt Corporation, nor can the Court disregard the evidence taken at the hearing before the Referee in which there was no dispute as to a sale. The main question being, if, under all the facts and circumstances, said sale of horses was conditional, in which event the title to said horses would vest in the petitioner, Appellee herein, or absolute, in which event the title to said horses would vest in the Trustee, Appellant herein, and this, the District Court, in the rendition of its decision, failed to consider.

(a) *Burden of Proof.*

The authorities hold that in a proceeding of this kind, the burden of proof rests upon him who claims the sale to have been a conditional one rather than absolute. The burden of producing a preponderance of the evidence is upon the party who has the affirmative of the issue and remains with him throughout the trial.

Code of Civil Procedure of California, Sec. 1869;

Code of Civil Procedure of California, Sec. 1981;

Scott vs. *Wood,* 81 Cal., 398;
Petaluma P. Co. vs. *Singley,* 136 Cal., 618;
Osgood vs. *Los Angeles T. Co.,* 137 Cal., 283;
Estate of Latour, 140 Cal., 421;
Holmes vs. *Warren,* 145 Cal., 460.

From the evidence herein, the only proof shown by petitioner, Appellee, is a *verbal* understanding he had with one Mr. Peavey, the President of the Bankrupt Corporation, that the title to the horses was reserved in petitioner until the purchase price therefor was paid. There is no proof, nor is there any intimation or suggestion of proof that the Bankrupt Corporation itself, acting through its Board of Directors, had any knowledge whatever of any condition attached to the sale of said horses, but, as is shown from the resolutions adopted by the Board of Directors, which is a part of the evidence, the sale was absolute, the Corporation giving negotiable promissory notes in payment of the purchase price for said horses, which notes were accepted by the vendor for the purchase price of said horses, according to petitioner's own evidence.

There is evidence to the effect that the Corporation had gotten out monthly financial statements of its assets and liabilities; that such statements were sent to the creditors, and that petitioner had received such statements and knew that the horses were claimed by the Corporation as its property. The burden is also on petitioner to show that the creditors, who had parted with value to the bankrupt, had actual notice of the conditional sale when they did so. In *Re Basemore,* 26 A. B. R., 498.

Having access to the books of the Corporation and having received its monthly financial statements, and not having in any way asserted his right or title to the horses in question under such purported conditional sale contract, as is contended by the Appellee, and having allowed the Corporation to carry the horses on their books and in their statements as their property, petitioner is now estopped from claiming the horses under the purported conditional sale contract, for it is too late to assert his title, if any he had, only at a time when there is grave fear of his inability to receive face value of the notes given in payment of the horses.

Giberson vs. *Fink,* 28 Cal. App., 25;

Hughes vs. *McAlister,* 55 Am. Dec., 143.

Courts are unanimous in holding that the failure of a party to give notice of a right in property where another without knowledge and in good faith is investing money, that such party is precluded from subsequently setting up that right thus concealed.

Fletcher vs. *Holmes,* 25 Ind., 458;

Peters vs. *Canfield,* 42 N. W., 125.

(b) It being conceded there was a sale of said horses to the Corporation—the only question in dispute being as to whether or not such sale was a conditional or an absolute one, the court erred in deciding the case on a theory foreign to the facts and the law.

However liberal the Court wished to be with the petitioner, Appellee herein, it cannot estrange itself from all the facts and circumstances attending the sale, for under all the authorities, where the property rights of

innocent creditors are involved, such facts and circumstances must be considered.

In *Edwards* vs. *Symonds,* 65 Mich., 348-355, it is held that a rule of law that permits a vendor to retain the title to goods bartered by him and placed apparently in the exclusive possession, ownership and control of the vendee until the whole purchase price is paid, without notice to parties dealing with such vendee, is at best a harsh one and should not be enforced except in cases where the agreement to so hold the title is positive and unambiguous.

In *In Re Leeds Woolen Mills,* 12 A. B. R., 136, at page 148, Judge Hammond clearly lays down the rule as follows:

> "We know from judicial experience in the administration of the bankruptcy statute, and from the numerous cases arising in the bankruptcy courts everywhere, that there is a tendency on the part of sellers of merchandise to protect themselves against the possible bankruptcy of their customers by equivocal devices which would enable them to claim a sale if the customer goes through the pending difficulties safely, but to claim ownership if he fails and becomes bankrupt. Resort is had oftentimes to undeniable and effective conditional sales and retention of the title, with similar methods of dealing to that we have here and with reservations appropriate to that kind of security, but sometimes it is not convenient or desirable to take the effective way of retaining title or making conditional sales, and yet the desire is to give to the transaction that false appearance, so as to meet possible emergencies. Therefore in my judgment it is the duty of the bankruptcy court to scrutinize such transactions with the utmost care, and protect the assets of bankrupts against invasions that may come by dubious dealings in business; and I think the rule

of law is established that the seller must show the utmost good faith in the transaction, and the burden is upon him to establish the fact by a preponderance of the testimony that he remains an owner and did not become a seller and creditor. The court cannot allow him to shift his position from creditor to owner upon any except the clearest proof of such self protection, made in good faith at the inception of the dealing, and not conceived afterwards for the purpose of escaping from a bad bargain."

Mushowaka Woolen Mfg. Co. vs. *Westveer,* 27 A. B. R., 345;

Matter of Penney and Anderson, 23 A. B. R., 115;

In Re Harriett E. Wells, 15 A. B. R., 419;

In Re George O. Hassam and Son, 18 A. B. R., 745;

Pontiac Buggy Co. vs. *Skinner,* 20 A. B. R., 206.

In *Mushowaka Woolen Mills* vs. *Westveer, supra,* reading from the syllabus:

"In determining whether a contract contemplates a conditional or an absolute sale of goods, the fact alone that the title to the goods is, in terms, reserved in the vendor until payment is made, does not necessarily import a conditional sale, but the court will take into consideration the whole instrument, as well as the acts and circumstances attending its execution and performance."

In *In Re Geo. O. Hassam, supra,* at page 749, the Court says:

"In the case at bar there is an attempted lien, absolutely secret, not even made known to the vendee, and never intended to be brought to light unless the vendee should become insolvent. The vendee was put in possession of a large number of wagons of which he was apparently the absolute

> owner. There was a secret attempt on the part of the vendor, should the vendee succeed in getting credit by having about him a large amount of unencumbered property and should thereafter be unable to pay debts so incurred, to make time notes given for said property 'immediately due and payable', and the vendee delivering to the vendor all goods remaining unsold, and all the while they should remain in the vendor. I cannot conceive in what manner the vendor anticipated that the goods could remain in its name when possession was passed to the vendee and no record made of the transaction. It has been repeatedly held that when personal property is delivered to a vendee for sale, or to be dealt with in a way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale and is fraud upon the creditors of the vendee." Citing *In Re Gracewich,* 8 A. B. R., 149; *In Re Carpenter,* 11 A. B. R., 147, 125 Fed., 831; *In Re Howland,* 6 A. B. R., 495,109 Fed., 869; *In Re Rogers,* 11 A. B. R., 93, 125 Fed., 169; *In Re Butterwick,* 12 A. B. R., 536, 131 Fed., 371.

In what position then, does the petitioner, Appellee herein, stand in this matter. According to his own contention, the only proof of a conditional sale of the horses to the bankrupt corporation, was a *verbal* understanding he had with one Mr. Peavey, the President of the Corporation, concerning a reservation of title. The Corporation, to his knowledge, were buying the horses outright, and he accepted the notes of the Corporation in *payment of the purchase price.* The Corporation was carrying the horses on its books as its property, and were so informing its creditors by its monthly financial statements, which statements petitioner had also received and took cognizance of; the Corporation exer-

cising indicia of ownership over the horses at all times since the sale by petitioner, petitioner cannot, after an adjudication in bankruptcy of the Corporation, hold up his hands in "holy horror" and remembering some private and secret understanding he had with the President of the Corporation, deprive the creditors of their just share in the distribution of the assets.

(c) The Corporation, through its Board of Directors acted in good faith in the purchase of the horses, and according to the resolutions adopted, and all the facts and circumstances attending the sale, purchased the horses outright.

A Corporation can only act by and through its Board of Directors in the making of contracts.

Cook on Corporations, 7th Ed. Secs. 712, 714, 716;

Gashwiler, et al. vs. *Willis, et al.,* 33 Cal., 11;

Pauley vs. *Pauley,* 107 Cal., 8;

Barney vs. *Pforr,* 117 Cal., 56;

Fontana vs. *Pac. Com. Co.,* 129 Cal., 51.

The board of directors to whom the authority to bind a corporation is committed is not the individual directors scattered here and there, whose assent to a given act may be collected by a diligent canvasser, but it is the board sitting and consulting together as a body. Individual directors, or any number of them less than a quorum, have no authority as directors to bind the corporation. And this is equally the rule although the director who assumes to do so may own a majority of the shares.

10 Cyc., 775;

Bank vs. *Bailhache,* 65 Cal., 327;

Monroe Mercantile Co. vs. *Arnold,* 34 S. E., 176;

Morrison vs. *Wilden Gas Co.,* 64 Am. St. Rep., 257;

Lockwood vs. *Thunder Bay Boon Co.,* 4 N. W., 292;

Nicholson City Co. vs. *Smalley,* 51 S. W., 527;

Limer vs. *Traders Co.,* 28 S. E., 730;

Ney vs. *Eastern Iowa Tel. Co.,* 144 N. W., 383;

State Savings Bank vs. *Winchester,* 25 Cal. App., 694.

According to the evidence, the board of directors of the bankrupt Corporation contracted with petitioner for the purchase of the horses and to pay for them in six, nine and twelve months, giving the negotiable promissory notes of the Corporation in payment of the purchase price. Mr. Levi accepted the notes in payment of the purchase price, *according to his own evidence.*

No mention was made of a condition attached to the sale of the horses at the time to the board of directors, or at any time to anybody, until after the Corporation's adjudication in bankruptcy. If there was a conditional contract entered into between petitioner and Mr. Peavey, the president of the Corporation, reserving the title to the horses, such a contract was kept in the strictest secrecy from the board of directors and the creditors of the corporation, was made between Mr. Levi and Mr. Peavey, who had no authority whatsoever to bind the Corporation in that way, and to whom Mr. Levi must look individually for the fulfillment of that particular phase of it.

Ney vs. *Eastern Iowa Tele. Co., supra;*

Clark and Marshall on Priv. Corp., Vol. 3, Sec. 728;

Groeltz vs. *Armstrong R. E. Co.,* 89 N. W., 21.

(d) The facts further disclose that the Corporation gave Mr. Levi its negotiable promissory notes in payment of the purchase price of said horses, which notes were accepted by Mr. Levi in *payment of the purchase price of said horses according to his own evidence.* The notes were so endorsed. Can there be any question, from the acts and circumstances surrounding the giving and acceptance of the notes, and from the endorsements on the notes, that such was the express agreement between the parties?

Where there is an express agreement to accept notes in payment, the original debt is extinguished;

30 Cyc., 1199;

78 Cal., 20;

122 Cal., 33.

and where it is agreed and understood that the notes given shall operate as payment, the creditor cannot sue on the claim but is confined to his remedy on the notes.

Carter, Rice Co. vs. *Howard,* 39 N. Y. Sup., 1060;

Carriere vs. *Ticknor,* 26 Ala., 561.

The presumption is in favor of the notes being accepted in payment and satisfaction of petitioner's demands, and the burden of proof is upon him to meet this presumption. The intent is gathered from the acts and circumstances.

Hall vs. *Stevens,* 116 N. Y., 201;

Whitbeck vs. *Van Ness,* 6 Am. Dec., 383;

Gibson vs. *Tobey,* 46 N. Y., 637.

We respectfully submit to the Court the examination of the whole record in this cause, firmly believing that

it will find prejudicial error in the ruling of the District Court, warranting a reversal of such judgment and ruling, and an affirming of the ruling and judgment of the Referee in Bankruptcy.

Dated San Diego, California, January 18, 1917.

A. L. WISSBURG,

Attorney for Appellant.

No. 2868

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. M. SHOOK, Trustee of the Estate of Farmers Dairy Association, a corporation, Bankrupt,

Appellant,

vs.

A. LEVI,

Appellee.

Brief of Appellee

JAMES E. O'KEEFE,
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Appellee.

Brief of Appellee

The statement of the case as presented by counsel for appellant in his brief, in some particulars is not in accordance with the Referee's Certificate on Review.

On page 4 of appellant's brief, counsel states: "That according to the evidence of petitioner, and Mr. Peavey, said notes represented the purchase price of said horses, and were received and accepted by said Levi in payment for said horses." Mr. Peavey testified in substance (p. 20, R.) that he, during the times mentioned in said petition, was the President of said Farmers Dairy Association, the bankrupt, and at certain times during said period was Manager of said corporation. Witness and petitioner (appellee) negotiated for the sale of two of said horses. Mr. Peavey, at that time stated, and witness understood, that title to said horses

was to remain in the seller until the purchase price therefor had been paid; that this contract and understanding was verbal; that promissory notes of the corporation representing the purchase price of said two horses were given by the corporation and it was understood between the witness and petitioner that the same should be done. That other and similar transactions were had between the witness and petitioner, which according to Mr. Peavey's testimony covered all the horses in dispute.

Mr. Levi, the appellee herein, according to the Referee's certificate on review, stated (p. 23, R.) that on each and all occasions in his dealings with Mr. Peavey relative to the sale of the horses, he stated that the title to the horses in question should remain in him until the purchase price was paid. Mr. Levi, on cross-examination stated (p. 24, R.) that: "the contract for sale of said horses was made with Mr. Peavey on behalf of the Farmers Dairy Association, and was verbal. That the Corporation took the horses and kept them in their charge; that he knew the corporation was carrying the horses on their books as an asset of the corporation; that promissory notes were given him by the corporation for the purchase price of said horses, and he accepted said notes; that title to said horses was not reserved in the notes, but that the notes were ordinary notes, due several months after date."

On page 4, counsel in his brief states:

> "That each and all of the notes so given in payment for said horses were in the possession of, and the property of, A. Levi, petitioner, at the time of the adjudication in bankruptcy of said Corporation."

I do not find that the record supports this statement.

Again on page 5, counsel in his brief states, that credit was extended to the corporation on the strength of its financial statements * * * * * that the petitioner, A. Levi, had received such statements. The record, we submit, does not support this statement. There is no evidence that the statements in question were gotten out by the corporation for the benefit and information of its creditors; there is no evidence that any credit was ever extended to the corporation on the strength of such financial statements. There is no evidence that the appellee, Mr. Levi, ever received any such statements from the corporation or had any knowledge of any financial statements of said company.

Again, on page 5, counsel for appellant in his brief states: "that petitioner, at no time prior to the bankrupt's adjudication, according to the evidence, asserted in any way, his right or title to said horses." We call attention to the Record, page 21, and quote therefrom testimony of Mr. Peavey: "That during the first part of July, 1915, witness entered into a certain contract with Mr. Schnell for the sale of the horses in question; that at this time, Mr. Levi, the petitioner, told Mr. Schnell of said contract of sale *by which* between witness and petitioned." Witness further testified (p. 21, R.): "That witness, petitioner and Mr. Serrano on one occasion went to the livery-stable of a Mr. Williams, in San Diego for the purpose of getting information concerning one of the horses in question, which had been traded by Mr. Powers, the then manager of said corporation; that petitioner at

that time told Mr. Williams that the horse in question belonged to him by virtue of the conditions of said sale."

Other and similar testimony was given by Mr. L. A. Serrano (p. 22, R.) a member of the Board of Directors of said corporation, Mr. George M. Kimball (p. 23, R.) also a member of the Board of Directors and Mr. Edgar Levi (p. 24, R.) a son of the petitioner.

It seems that the only officer of the company, as revealed by the record, which did not have knowledge of the circumstances surrounding the sale of the horses and the conditions thereof, was Mr. H. Stephenson, who was Secretary of the Association at the time of the purchase of the last-named five horses from Mr. Levi, and he testified (p. 25, R.) that when Mr. Peavey came to his office and requested him to sign the notes of Mr. Levi, that "Mr. Peavey did not state any condition attached to the sale of said horses, and witness considered that the notes were given in payment of the purchase price. That witness did not know, nor did Mr. Peavey tell him that the title to said horses was reserved in seller," and witness further stated that the Board of Directors of said corporation of which he was a member, took action on said matter.

No findings were made by the Referee and the only action taken by the Referee on the petition in reclamation of Mr. Levi, is found in the Record (p. 18, folio 21) which is as follows: "It is hereby ordered that the petition in reclamation of the said Adolph Levi, as to the property claimed to have been sold on conditional sale, be, and the same is hereby, dismissed and denied." Just

why the Referee dismissed and denied the petition in reclamation does not appear.

It is true, as stated by counsel in his brief at page five, that the District Judge rendered an opinion reversing the order and decision of the Referee, which opinion was not entirely in harmony with the argument and reasoning of counsel, either for the appellant or appellee, but I do not agree with counsel in his statement that such opinion was on "a theory foreign to and entirely without the scope of the evidence."

ARGUMENT.

We believe it is conceded that there is no Statute in California requiring the recording of a contract of sale reserving title, neither is there any Statute which would render an oral agreement of such character ineffectual.

The Supreme Court of California has recognized as valid an oral agreement reserving title in the seller to personal property until the purchase price was paid.

Wise vs. *Collins*, 121 Cal., 147.

In the absence of Statute requiring contract of conditional sale to be in writing or requiring the filing or recording thereof, an oral contract would be valid.

Weier & Frank Company vs. *Sabin*, 214 Fed., 231;

Blackwell vs. *Walker*, 5 Fed., 419.

Under the laws of California such a contract as appellee relies on, reserving the title, is valid as against creditors and consequently would be good as against the Trustee in Bankruptcy.

Perkins vs. *Mettler*, 126 Cal., 100;

Van Allen vs. *Francis*, 123 Cal., 474.

The giving of a note for the purchase price will not, in the absence of agreement to that effect, vest title in the seller.

35 Cyc. 672, Note 47.

Heryford vs. *Davis,* 102 U. S., 235.

It might be held under the record in this case, that no effectual contract was entered into between the petitioner, appellee herein, and said appellant, on the theory that the corporation, through its Board of Directors, did not authorize the making of such a contract as the petitioner relies on.

Fontana vs. *Pacific Can Co.*, 129 Cal., 51.

However, in this particular, we call the Court's attention to the testimony of Mr. Peavey (p. 22 top): "That the matter of said purchases was brought to the attention of the Board of Directors of said corporation and they took action on same." Witness had already in his testimony, explained the conditions of said purchase, he then states that "said purchase" was brought to the attention of said Board of Directors and they took action on it. Would it not be fair to presume, under such testimony, that witness brought to the attention of the Board of Directors the conditions of the purchase and the reservation of the title in the seller? Again, Mr. Serrano testified: (p. 23) "That the matter was brought to the attention of the Board of Directors of the corporation and they took action on it." Mr. Serrano's testimony shows that he, a member of the Board of Directors, had knowledge of the fact that title to said property was reserved in the seller and when he testified that: "the matter was brought to the attention of the Board of Direct-

ors" would it be a fair inference that he sat by and allowed the Board of Directors to be misled as to the conditions of the purchase? In fact, Mr. Serrano appears to have made the motion on both occasions when the Board of Directors took action concerning the purchase in question. (R. p. 26.)

Under the Record, however, a matter arises which will estop the appellant from repudiating the contract on which the appellee relies.

> "One of the most frequent applications of the principle of equitable estoppel against corporations is that which arises where the corporation, when rights are asserted against it by virtue of its own contract, sets up a want of power in its officers to make the contract. One of the most frequent illustrations of this principle is presented where a corporation allows an officer, habitually and in the face of the public, to perform for it and in its name certain acts, in which case it will be estopped, as against a member of the public who innocently parts with value on the faith of the officer having the rightful power to do such an act, from denying that such is the fact."

10 Cyc. 1066, Paragraph 5;

Zabriskie vs. *Cleveland etc. R. Co.*, 23 How. (U. S.) 381, 16 L. ed., 488.

> "The same principle prevents a corporation from repudiating the acts of its officer within the general scope of its powers, in the absence of fraud on the part of the person seeking to charge the corporation or of collusion between him or his privies, and the officers of the corporation making the contract."

10 Cyc. 1067, and cases cited.

Seeley vs. *San Jose Independent Mill, etc., Co.*, 59 Cal., 22.

Corporation estopped from disputing the agency of a person assuming to order goods for it.

Electric Supply Co. vs. *Jersey City Electric Light Co.*, 42 Hun. (N. Y.) 659, 4 N. Y. St., 516.

It can not be disputed under the record of this case that the defunct association apparently clothed Mr. Peavey with authority to enter into the contract in question. It accepted the benefits of his contract retaining the horses and using the same. Supposing that Mr. Levi had brought suit against the association before it went into bankruptcy, for the purpose of recovering his property, would the association be permitted to claim title to the property on the theory that one of its officers whom it had authorized to purchase the property, did not explain to it in detail, the conditions of the contract of purchase and therefore and because of the officer's neglect the association would acquire an absolute title to the property in question and the seller would be powerless to recover his property, not because of any fault of his, but the neglect of the agent of the corporation who had apparent authority to act for it and was acting within the scope of such authority?

It does not appear how many members constituted the Board of Directors, but it does appear from the Record that Mr. Peavey, Mr. Serrano and Mr. Kimball, all members of the Board of Directors, had knowledge of the conditions of the contract and that title was reserved in the seller. Mr. Peavey, if he was President of the association during the period in question, must also have been a member of the Board of Directors (Sec. 308 C. C. Cal.) which provides: "Immediately after their selection the

directors must organize by the election of a President, who must be one of their number, etc."

No other contracts were had except those entered into by Mr. Peavey as disclosed by the record. Can the association stand on the contract so made by its agent, Mr. Peavey, providing it was an absolute sale, and on the other hand repudiate it if title was reserved? Will the association be permitted to profit by its own mismanagement? Mr. Levi had no knowledge at any time that the association claimed the title to the property in question. If any such claim was ever made, he at all times has occupied the position of an innocent party. The fact that he had knowledge that the association carried the property on its books as an asset, we submit in the absence of other conditions, would not prejudice his claim. If they listed the horses as an asset, it must be presumed that they also listed the liability to Mr. Levi under its agreement. Whether or not the association defrauded any of its creditors on the theory that it owned the horses in question free and clear or whether or not it failed to disclose the nature of the conditional purchase, does not appear and neither does it appear that Mr. Levi had any knowledge or was ever a party to any misrepresentation or fraud against the association or any of its creditors.

The mere fact that the contract in question was oral and consequently not recorded, we submit would not authorize the imputation of the same being a secret contract and a fraud on the creditors.

In re C. K. Hutchins Co., 179 Fed., 864.

If Mr. Levi started with ownership of horses, which it is admitted that he did and if he has not divested him-

self of such ownership by some positive act or if he is not estopped because of his acts or conduct from still asserting such ownership, then his claim should prevail.

Roth vs. *Smith,* 215 Fed., 82.

We submit under all the facts and circumstances as disclosed by the Record, and which are undisputed, it would be an injustice to deprive the claimant of his property.

We submit the decision of the District Judge was most equitable to the appellant, and we call attention to that part of the decision: "That the bankrupt corporation is entitled to a return of so much of the purchase price as has been paid thereon, less such a sum not to exceed in any event the amount of the purchase price thus far paid." Only a small amount in comparison with the purchase price of the property in question was paid, as disclosed by the record on page 26. The appellant still continuing to retain the property, would it be equitable to hold that the appellee shall not be entitled to more for the use of the property, than the amounts paid toward the purchase price?

The Court may make an order in this respect which shall be equitable and just.

In re Hooven Owens Rentschler Co., 195 Fed., 424.

It is also true that the appellee is entitled to recover the reasonable value for the use of the property.

In re Daterson Publishing Co., 188 Fed., 64.

The authorities cited by appellant in his brief do not in our judgment apply to such a case as the one at bar.

We contend that the judgment of the District Court should be affirmed, with such modifications as may be

equitable owing to the continuing possession of the property by the appellant. It may be that this Court will adopt a different line of reasoning from that adopted by the District Court, but in any event, we submit that the claim of the appellee should be recognized and his property ordered returned to him with such additional orders as justice may require.

Dated at San Diego, California, February first, 1917.

JAMES E. O'KEEFE,
Attorney for Appellee.

No. 2870

United States

Circuit Court of Appeals

For the Ninth Circuit.

VACHON & STERLING, a Co-partnership Firm, Composed of PETER VACHON and J. S. STERLING,

Plaintiffs in Error,

vs.

NORTHERN NAVIGATION COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filed

DEC 22 1916

F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2870

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

THOMAS A. MARQUAM and LOUIS K. PRATT,
Attorneys for Plaintiffs and Plaintiffs in Error,
Fairbanks, Alaska.

JOHN K. BROWN and McGOWAN & CLARK,
Attorneys for Defendant and Defendant in Error, Fairbanks, Alaska. [1*]

In the District Court for the Territory of Alaska, Fourth Judicial Division.

No. 2005.

VACHON & STERLING, a Copartnership Firm Composed of PETER VACHON and J. S. STERLING,

Plaintiffs in Error,

vs.

NORTHERN NAVIGATION CO., a Corporation,

Defendant in Error.

Praecipe for Transcript on Writ of Error.

To J. E. Clark, clerk of said court:

You will please prepare and certify to a transcript of the record in the above-entitled action, for the use of the United States Circuit Court of Appeals for the Ninth Judicial Circuit in connection with the writ of error heretofore sued out by the plaintiffs, and when such transcript is completed, forward the same to F. D. Monckton, Clerk of said Court of Appeals, at San Francisco, California.

*Page-number appearing at foot of page of original certified Transcript of Record.

The said transcript must contain the following papers, to wit:

1st. The original complaint.

2d. The amended complaint.

3d. The motion to strike and make original complaint more definite and certain.

3½. The motion to strike and make more definite and certain, the amended complaint.

4th. The demurrer to amended complaint.

5th. All minute and other journal entries including the final judgment, that were made and entered of record by the clerk in connection with the case.

Also the petition for writ of error, assignment of errors, order allowing writ, etc., and bond and copy of the praecipe for transcript.

6th. The writ of error, citation and order extending time to file transcript in the Court of Appeals are original papers and must be forwarded to Mr. Monckton at San Francisco, California, along with the transcript.

THOMAS A. MARQUAM and
LOUIS K. PRATT,
Attorneys for Plaintiffs. **[2]**

Service of the above and foregoing praecipe for transcript on writ of error by receipt of a copy thereof admitted this 21 day of September, 1916.

JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sept. 25, 1916. J. E. Clark, Clerk. **[3]**

[Caption and Title.]

Complaint.

The plaintiffs for cause of action against defendant allege and state;

I.

At all times mentioned in this complaint the plaintiffs were a copartnership firm engaged in the mercantile business in the city of Fairbanks and elsewhere in Alaska and transacted their business under the firm name of Vachon & Sterling.

II.

That at all times mentioned herein the defendant, Northern Navigation Co., was a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey and authorized and, in fact, transacted business within the Territory of Alaska.

III.

That in March, 1907, the said Peter Vachon, for and on behalf of plaintiff firm, entered into a contract with the Northern Commercial Co., a corporation organized and existing under the Laws of the State of New Jersey and authorized to and, in fact doing business in the Territory of Alaska, to transport for the plaintiffs 1500 tons of merchandise from Seattle, Washington, to Chena, Alaska by an all-water route. That afterwards the said contract was assigned by the said Northern Commercial [4] Co., and taken over and accepted by the defendant, the Northern Navigation Co. and the latter company with the consent of the plaintiff undertook to carry

out the terms of the said contract as between said Peter Vachon and said Northern Commercial Co.

IV.

That by the terms of the said contract, so transferred and assigned to the defendant company, it was provided that said merchandise of the plaintiffs' was to be carefully and safely transported by ocean steamers and river boats from the city of Seattle in the State of Washington to the town of Chena, Territory of Alaska, for delivery to plaintiffs. That at said time defendant was engaged in the business of transporting merchandise by ocean and river steamers between the points mentioned and, in fact, during the said season transported from Seattle to Chena and delivered to plaintiffs most of the said 1500 tons of general merchandise, but portions thereof were lost in transit by the negligence of defendant's employees and never delivered, so that at the end of the season a controversy arose between plaintiffs and defendant with reference to such shortage. That said controversy was the subject of negotiations between them at the close of navigation in the year 1907 and continued to be until some time in the month of April, 1908, at which time plaintiffs and defendant adjusted their differences, covering the matter of the claims of plaintiffs against the defendant for the latter's failure to deliver to plaintiffs at Fairbanks 30 boxes of candles, 32 sacks of onions, 49 gunnies of flour and 21 sacks of potatoes. That at the time of such adjustment defendant admitted its failure to deliver to plaintiffs the said merchandise and that it was liable to plaintiffs for

the laid-down cost thereon at the city of Fairbanks. That on or about the 6th day of July, 1908, at Fairbanks, an account was stated between plaintiffs and defendant concerning such adjustment for loss of merchandise, upon which a balance of $853.99 was found [5] to be due from said defendant to this plaintiff, which sum defendant then agreed to pay.

The plaintiffs for second and further cause of action against the defendant alleges and state:

I.

At all times mentioned in this complaint the plaintiffs were a copartnership firm engaged in the mercantile business in the city of Fairbanks and elsewhere in Alaska, and transacted their business under the firm name of Vachon & Sterling.

II.

That at all times mentioned herein the defendant, the Northern Navigation Co., was a corporation duly organized and existing under and by virtue of the Laws of the State of New Jersey and authorized and, in fact, transacting business within the Territory of Alaska.

III.

That in March, 1907, the said Peter Vachon, for and on behalf of the plaintiff firm, entered into a contract with the Northern Commercial Co., a corporation organized and existing under the laws of the State of New Jersey and authorized to and, in fact, doing business in the Territory of Alaska, to transport for the plaintiffs 1500 tons of merchandise from Seattle, Washington, to Chena, Alaska, by an all-water route. That afterwards the said contract

was assigned by the said Northern Commercial Co. and taken over and accepted by the defendant, the Northern Navigation Co., and the latter company with the consent of the plaintiffs undertook to carry out the terms of the said contract as between said Peter Vachon and said Northern Commercial Co. **[6]**

IV.

That by the terms of the said contract, so transferred to and assigned by the defendant company it was provided that said merchandise of the plaintiffs was to be carefully and safely transported by ocean steamers and river boats from the City of Seattle in the State of Washington, to the town of Chena, Territory of Alaska, for delivery to plaintiffs. That at said time defendant was engaged in the business of transporting merchandise by ocean and river steamers between the points mentioned, and, in fact, during said season transported from the City of Seattle to the town of Chena and delivered to plaintiffs most of the said 1500 tons of general merchandise, but a large shipment of eggs belonging to the plaintiffs being a part of the said 1500 tons was damaged by getting wet while in transit by the negligence of defendant's employees, to such an extent that at the end of the season a controversy arose between plaintiffs and defendant with reference to such damage, said controversy being the subject of negotiations between them at the close of navigation in the year 1907, and continued to be such until some time between the 16th and 26th days of March, 1908, at which time the plaintiffs

and defendant adjusted their differences, covering the matter of the claim of plaintiffs against defendant for the damage to said eggs, the defendant then and there acknowledging its liability for the loss of 60 cases of said eggs and its liability to plaintiffs for the laid-down cost, thereof to plaintiffs, at Fairbanks, to wit, the sum of $677.82. That between March 16th and Apr. 15th, 1908, at Fairbanks an account was stated between plaintiffs and defendants concerning such adjustment for loss of said eggs upon which a balance of $677.82 was found to be due from said defendant to *this* plaintiffs, [7] which sum defendant then agreed to pay.

WHEREFORE, the plaintiffs pray judgment against the defendant;

1st. Upon the first cause of action, for the sum of $853.99 together with interest thereon at 8% per annum from January 1st, 1909.

2d. On the second cause of action, for the sum of $677.82, together with interest at 8% per annum thereon from January 1st, 1909.

3d. For the costs and disbursements in this cause and behalf expended.

T. A. MARQUAM,
LOUIS K. PRATT & SON,
Attorneys for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

Peter Vachon on oath says: I am one of the plaintiffs in the above-entitled cause; I have read the above and foregoing complaint and am familiar with

the allegations and statements therein contained and the same are true as I verily believe.

PETER VACHON.

Subscribed and sworn to before me this 14th day of March, 1914.

[Seal] T. A. MARQUAM,

Notary Public in and for Territory of Alaska.

My commission expires July 6, 1914.

[Endorsed]: No. 2005. District Court, 4th Division, Territory of Alaska. Vachon & Sterling, a Copartnership Firm Composed of Peter Vachon and J. S. Sterling, Plaintiffs, vs. Northern Navigation Co., a Corporation, Defendant. Complaint. Filed in the District Court, Territory of Alaska, 4th Div. March 14, 1914. Angus McBride, Clerk. **[8]**

[Caption and Title.]

Motion to Strike.

Now comes the above-named defendant, by Messrs. McGowan & Clark and John K. Brown, its attorneys, and moves this Honorable Court, for an order striking from the complaint herein:

I.

All of paragraph IV of the first cause of action, from the beginning of said paragraph, to and including the third line thereof, on page 3 of said complaint, on the ground that the same, and the whole thereof, contains matters which are irrelevant, immaterial and redundant;

II.

All of paragraph IV of the second cause of action,

from the beginning of said paragraph, to and including the figures $677.82, in the third line from the bottom of page 5 of said complaint, on the ground that the same, and the whole thereof, contains irrelevant, immaterial and redundant matter.

WHEREFORE, defendant prays that said complaint be dismissed with costs.

Fairbanks, Alaska, May 16, 1914.

McGOWAN & CLARK,
JOHN K. BROWN,
Attorneys for Defendant. **[9]**

[Caption and Title.]

Motion to Make More Definite and Certain.

The above-named defendant hereby moves this Honorable Court for an order requiring the plaintiff:

I.

To make its first cause of action contained in the complaint herein more definite and certain, by setting out particularly whether its alleged cause of action is based upon a claim for violation of a contract of *of* freightment, or upon an account stated.

II.

To make its second cause of action contained in the complaint herein more definite and certain, by setting out particularly whether its alleged cause of action is based upon a claim for violation of a contract of *of* freightment, or upon an account stated.

Fairbanks, Alaska, May 16, 1914.

McGOWAN & CLARK,
JOHN K. BROWN,
Attorneys for Defendant.

Due service of the within motions and receipt of a copy thereof are hereby acknowledged this 16th day of May, 1914.

T. A. MARQUAM,
Attorneys for Plaintiff.

[Endorsed]: No. 2005. In the United States District Court, Territory of Alaska, Fourth Division. Vachon & Sterling, Plaintiff, vs. Northern Navigation Company, Defendant. Motion to Strike and Motion to Make More Definite and Certain. Filed in the District Court, Territory of Alaska, 4th Div. May 16, 1914. Angus McBride, Clerk. **[10]**

[Caption and Title.]

Hearing on Motion to Strike Portions of Complaint.

Now on this day came on for hearing defendant's motion to strike portions of the complaint herein, Louis K. Pratt appearing in behalf of plaintiffs, J. K. Brown in behalf of defendant. After argument thereon by the respective attorneys said matter was submitted to the Court, and decision thereon was reserved until a later date.

CHARLES E. BUNNELL,
District Judge. **[11]**

[Caption and Title.]

Order Granting Motion to Strike from Complaint.

The motion of the above-named defendant to strike from the complaint herein all of paragraph IV of the first cause of action set out in said com-

plaint, from the beginning of said paragraph IV to and including the 3d line thereof on page 3 of said complaint, and also the motion of the above-named defendant to strike from the second cause of action set out in said complaint all of paragraph IV of said second cause of action, from the beginning of said paragraph to and including the figures $677.82 in the sixth line from the bottom of page 5 of said complaint, coming on for hearing on the 27th day of March, 1915, and having been duly argued in behalf of the respective parties, by their respective attorneys and submitted to the Court for its decision, now on this 30th day of March, 1915,

IT IS ORDERED that all of paragraph IV of the first cause of action set out in said complaint, from the beginning of said paragraph to and including the 3d line thereof, on page 3, of said complaint, be, and the same is hereby, stricken from said complaint; and

IT IS FURTHER ORDERED that all of paragraph IV of the second cause of action set out in said complaint, from the beginning of said paragraph to and including the figures $677.82, **[12]** being in the 6th line from the bottom of page 5 of said complaint, be, and the same is hereby stricken from said complaint; and

IT IS FURTHER ORDERED that the above-named plaintiff have five (5) days from the date hereof, within which to serve and file an amended complaint in this action.

Done in open court this March 30, 1915.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 103.

[Endorsed]: No. 2005. In the United States District Court, Territory of Alaska, Fourth Division. Vachon & Sterling, a Copartnership, etc., Plaintiff, vs. Northern Navigation Co., Defendant. Order Granting Motion to Strike from Complaint. Filed in the District Court, Territory of Alaska, 4th Div. Mar. 30, 1915. Angus McBride, Clerk. By P. R. Wagner, Deputy. **[13]**

[Caption and Title.]

Amended Complaint.

The plaintiffs for cause of action against defendant allege and state:

I.

At all times mentioned in this complaint the plaintiffs were a copartnership firm engaged in the mercantile business in the city of Fairbanks and elsewhere in Alaska and transacted their business under the firm name of Vachon & Sterling.

II.

That at all times mentioned herein the defendant, Northern Navigation Co., was a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and authorized and, in fact, transacted business with the Territory of Alaska.

III.

That in March, 1907, the said Peter Vachon, for and on behalf of the plaintiff firm, entered into a contract with the Northern Commercial Co., a corporation organized and existing under the laws of the State of New Jersey and authorized and, in fact, doing business in the Territory of Alaska, to transport for the plaintiffs 1500 tons of merchandise from Seattle, Washington, to Chena, Alaska, by an all-water route. That afterwards the said contract was assigned by the said Northern Commercial Co. and taken over and accepted by the defendant, the Northern Navigation Co. and the latter company with the consent of the **[14]** plaintiff undertook to carry out the terms of the said contract as between said Peter Vachon and said Northern Commercial Co.

IV.

That at the close of the open season of 1907, a controversy arose between the plaintiffs and the defendant concerning the failure of defendant to deliver to plaintiffs a part of the said 1500 tons of merchandise, which was adjusted on or about the 6th day of July, 1908, at Fairbanks, and an account was stated between the plaintiffs and defendant concerning such adjustment for loss of merchandise, by which a balance of $853.99 was found to be due these plaintiffs from defendant, which sum defendant then and thereby agreed to pay.

The plaintiffs for second and further cause of action against the defendant *alle* and state:

I.

At all times mentioned in this complaint the plaintiffs were a copartnership firm engaged in the mercantile business in the city of Fairbanks and elsewhere in Alaska and transacted their business under the firm name of Vachon & Sterling.

II.

That at all times mentioned herein the defendant, the Northern Navigation Co., was a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and authorized and, in fact, transacted business within the Territory of Alaska.

III.

That in March, 1907, the said Peter Vachon, for and on behalf of the plaintiff firm, entered into a contract with the Northern Commercial Co., a corporation organized and existing under the laws of the State of New Jersey and authorized to and, [15] in fact, doing business in the Territory of Alaska, to transport for the plaintiffs 1500 tons of merchandise from Seattle, Washington, to Chena, Alaska, by an all-water route. That afterwards the said contract was assigned by the said Northern Commercial Co. and taken over and accepted by the defendant, the Northern Navigation Co., and the latter company with the consent of the plaintiffs undertook to carry out the terms of the said contract as between said Peter Vachon and said Northern Commercial Co.

IV.

That at the close of the open season of 1907, a

controversy arose between the plaintiffs and the defendant concerning the failure of defendant to deliver to plaintiffs a part of the said 1500 tons of merchandise, which controversy at some time between March 16, and April 15, 1908, Fairbanks, Alaska, was adjusted, and an account was stated between plaintiffs and defendant concerning the same by which a balance of $677.82 was found to be due from the said defendant to these plaintiffs, which said sum the defendant then and thereby agreed to pay.

WHEREFORE, the plaintiffs pray judgment against the defendant;

1st. Upon the first cause of action, for the sum of $853.99, together with interest thereon at 8% per annum from January 1st, 1909.

2d. On the second cause of action, for the sum of $677.82, together with interest at 8% per annum thereon from January 1st, 1909.

3d. For the costs and disbursements in this cause and behalf expended.

THOMAS A MARQUAM,
LOUIS K. PRATT & SON,
Attorneys for Plaintiffs. **[16]**

United States of America,
Territory of Alaska,—ss.

J. S. Sterling, on oath says: I am one of the plaintiffs in the above-entitled cause; I have read the above and foregoing Amended Complaint and am familiar with the allegations and statements therein contained and the same are true as I verily believe.

J. S. STERLING.

Subscribed and sworn to before me this 25th day of June, 1915.

[Seal] LOUIS K. PRATT,
Notary Public in and for Territory of Alaska.

My commission expires Nov. 10, 1915.

Service of the foregoing complaint admitted and a true copy thereof received this 26 day of June, 1915.

McGOWAN & CLARK,
JOHN K. BROWN,
Attorneys for Defendant.

[Endorsed]: No. 2005. In the District Court for the Territory of Alaska, 4th Div. Vachon & Sterling, a Copartnership Firm Composed of Peter Vachon and J. S. Sterling, Plaintiffs, vs. Northern Navigation Co., a Corporation, Defendant. Amended Complaint. Filed in the District Court, Territory of Alaska, 4th Div. Jun. 26, 1915. J. E. Clark, Clerk. By P. R. Wagner, Deputy. **[17]**

[Caption and Title.]

Motion to Strike Portions of Plaintiff's Amended Complaint.

Comes now the defendant above-named and moves to strike from the plaintiff's amended complaint on file herein;

(1) All of paragraph four of the first cause of action therein, on the ground that the matters and things therein contained are sham, frivolous, irrelevant, and redundant;

(2) All of paragraph four of plaintiff's alleged second cause of action, on the ground that the mat-

ters and things therein contained are sham, frivolous, irrelevant, and redundant.

McGOWAN & CLARK,
Attorneys for Defendant.

Due service of the within Motions and receipt of a copy thereof are hereby acknowledged this 22d day of July, 1915.

THOMAS A. MARQUAM and
LOUIS K. PRATT & SON,
Attorneys for Plffs.

[Indorsed]: No. 2005. In the United States District Court, Territory of Alaska, Fourth Division. Vachon & Sterling, Plaintiffs, vs. Northern Navigation Co., Defendant. Motion to Strike and Motion to Make More Definite and Certain. Filed in the District Court, Territory of Alaska, 4th Div. Jul. 22, 1915. J. E. Clark, Clerk. By Sidney Stewart, Deputy. **[18]**

[Caption and Title.]

Motion to Make Complaint More Definite and Certain.

Comes now the defendant in the above-entitled action and, in the event that the Court has not granted the motion filed herewith to strike portions of plaintiff's amended complaint, moves this Court for an order requiring plaintiff to make his said amended complaint more definite and certain in the following particulars, to wit:

(1) To make paragraph four of his first alleged cause of action more definite, by setting forth in

what way the controversy arose between plaintiff and defendant, and if said controversy arose from loss of merchandise that he be required to set forth a particular statement of the merchandise that is alleged to have been lost or not delivered, the amount thereof, and a particular description thereof, and to furnish a bill of particulars concerning the same.

(2) To make paragraph four of his alleged second cause of action more definite, by setting forth in what way the controversy arose between plaintiff and defendant, and if said controversy arose from loss of merchandise that he be required to set forth a particular statement of the merchandise that is alleged to have been lost or not delivered, the amount thereof, and a particular description thereof, and to furnish a bill of particulars concerning the same.

(3) To set forth definitely in said complaint whether the alleged controversy, described in paragraph four of the **[19]** second alleged cause of action, is the same controversy that is described in paragraph four of the alleged first cause of action, and if not, to state why and in what manner two alleged accounts stated were arrived at, and if so, whether they concern the same property, and whether they concern separate shipments, and to inform defendant definitely whether the sum of eight hundred fifty-three dollars ninety-nine cents, claimed as a balance due on an account stated, as set forth in plaintiff's alleged first cause of action, concerns the same property and the same account

that is described in paragraph four of said alleged second cause of action.

McGOWAN & CLARK,
Attorneys for Defendant.

[Endorsed]: Filed in the District Court, Territory of Alaska, 4th div. Jul. 23, 1915. J. E. Clark, Clerk. By Sidney Stewart, Deputy. **[20]**

[Caption and Title.]

Order Denying Motion to Make Complaint More Definite and Certain.

Now on this day the hearing on defendant's motion to strike and defendant's motion to make more definite and certain came on regularly at this time to be heard by the Court, Louis K. Pratt appearing for and on behalf of plaintiffs and John K. Brown appearing for and on behalf of defendant, and after argument by counsel for the respective parties hereto, and counsel for defendant herein waiving his motion to make more definite and certain, and the Court being fully advised in the premises,

IT IS ORDERED that the defendant's motion to strike be and the same is hereby denied and defendant is given five days to plead further.

CLERK'S NOTE: To which defendant notes an exception.

CHARLES E. BUNNELL,
District Judge. **[21]**

[Caption and Title.]

Demurrer.

Comes now the defendant in the above-entitled action and demurs to the plaintiff's alleged first cause of action, upon the grounds following, to wit:

(1) That the matters and things alleged therein do not constitute a cause of action against the defendant herein.

(2) That said alleged first cause of action shows upon its face that it is based upon an alleged account stated arising out of a breach of contract, and a breach of contract cannot be used as a basis of an account stated.

(3) That said alleged first cause of action shows upon its face that it is barred by the statute of limitations, and that the suit has not been commenced within six years from the date of the creation of said liability, if any existed.

Defendant demurs to plaintiff's alleged second cause of action upon the grounds following, to wit:

(1) That the matters and things alleged therein do not constitute a cause of action against the defendant herein.

(2) That said alleged second cause of action shows upon its face that it is based upon an alleged account stated arising out of a breach of contract, and a breach of contract cannot be used as a basis of an account stated.

(3) That said alleged second cause of action shows upon its face that it is barred by the statute

of limitations, and that the suit has not been commenced within six years after the creation of said liability, if any existed. [22]

McGOWAN & CLARK and
JOHN K. BROWN,
Attorneys for Defendant.

Due service hereof admitted this 24th day of Sept. 1915.

THOS. A. MARQUAM and
LOUIS K. PRATT & SON,
Attorneys for Pltffs.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sep. 24, 1915. J. E. Clark, Clerk. By L. F. Protzman, Deputy. [23]

[Caption and Title.]

Order Setting Hearing on Demurrer.

Now at this time, upon motion of Louis K. Pratt, one of the attorneys for plaintiffs herein, and no objections being made,

IT IS ORDERED that the hearing on demurrer be set for 2 o'clock P. M. Wednesday, September 29th, 1915.

CHARLES E. BUNNELL,
District Judge. [24]

[Caption and Title.]

Hearing on Demurrer.

Now on this day J. K. Brown appearing for and on behalf of defendant and L. K. Pratt appearing for and on behalf of plaintiff, the hearing on defendant's

demurrer to plaintiff's amended complaint came on regularly to be heard by the Court, and after argument by counsel for the respective parties, and the Court being fully advised in the premises, and having carefully considered the matter,

IT IS ORDERED that defendant's demurrer be and the same is hereby sustained.

Clerk's note: Plaintiff excepts, exception allowed.

CHARLES E. BUNNELL,
District Judge. [25]

In the District Court for the Territory of Alaska, Fourth Judicial Division.

No. 2005.

VACHON & STERLING, a Copartnership Firm Composed of PETER VACHON and J. S. STERLING,

Plaintiff,

vs.

NORTHERN NAVIGATION COMPANY, a Corporation,

Defendant.

Judgment.

Be it remembered that, on the twenty-ninth day of September, A. D. one thousand nine hundred fifteen, the demurrer of the above-named defendant to each of the causes of action set out in plaintiff's amended complaint, on the ground that neither of said causes of action states facts sufficient to constitute a cause of action against defendant, came on regularly for hearing at two o'clock P. M. on said

day, Thos. A. Marquam and Louis K. Pratt, esquires, appearing as counsel for plaintiff, and John K. Brown, esquire, and Messrs McGowan & Clark, appearing as counsel for defendant; whereupon said counsel for the respective parties argued said demurrer, and the Court, being fully advised in the premises, ordered that said demurrer be sustained as to each of the causes of action set out in plaintiff's amended complaint; whereupon the attorneys for the plaintiff requested the Court to grant them leave to file a second amended complaint in behalf of plaintiff, to which the counsel for defendant then and there objected, and the Court having sustained said objection, refused to permit the filing of such second amended complaint, to which ruling of the Court, as well as to the ruling of the Court sustained said demurrer, counsel for plaintiff then and there duly excepted; whereupon counsel for defendant moved the Court that judgment [26] be entered in favor of defendant and against plaintiff, to the effect that plaintiffs take nothing by their said causes of action, and that defendant have judgment against said plaintiff for its cost and disbursements herein, which motion was granted by the Court;

Now, therefore, in pursuance of the proceedings above recited, it is ordered and adjudged by the Court that the plaintiff take nothing by its said causes of action set forth in its amended complaint, and that the defendant herein, Northern Navigation Company, a corporation, do have and recover of and from the plaintiffs, Peter Vachon and J. S. Sterling copartners under the firm name and style of Vachon

& Sterling, its costs and disbursements herein, to be taxed by the Clerk of this Court.

Done at Fairbanks, Alaska, on this second day of October, A. D. one thousand nine hundred fifteen.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 266.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Oct. 2, 1915. J. E. Clark, Clerk. By Sidney Stewart, Deputy. **[27]**

[Caption and Title.]

Assignment of Errors.

The plaintiffs below and plaintiffs in error in the appellate court will rely for a reversal of the judgment against them in the said Court on the following errors occuring during the progress of the trial, to wit:

1. The Court erred in sustaining the demurrer to plaintiffs amended complaint, interposed by defendant.

2. The Court erred in refusing to allow plaintiffs below to further amend their amended complaint after the Court had sustained a demurrer thereto.

3. The Court erred in its final judgment in adjudging that plaintiffs take nothing by their amended complaint and dismissing their action and rendering a judgment in favor of the defendant and against the plaintiffs for the costs.

THOMAS A. MARQUAM and
LOUIS K. PRATT,
Attys. for Plffs.

Service of the above and foregoing assignment of errors, by receipt of a copy thereof, is hereby admitted this 21 day of September, 1916.

JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant.

[Indorsed]: Filed in the District Court, Territory of Alaska, 4th Div. Sept. 25, 1916. J. E. Clark, Clerk. [30]

Writ of Error.

United States of America,—ss.

The President of the United States, to the Honorable, the Judge of the District Court for the Territory of Alaska and District of Alaska, Fourth Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment in a civil action in said District Court before you between Vachon & Sterling, a copartnership firm composed of Peter Vachon and J. S. Sterling, plaintiffs below and plaintiffs in error, and the Northern Navigation Co., a corporation, defendant below and defendant in error, a manifest error hath happened to the great damage of the said plaintiff below and plaintiff in error, as by his petition for a writ of error appears.

We, being willing that error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record

and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 25th day of October, 1916, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States the 25th day of September, 1916.

[Seal] J. E. CLARK,
Clerk of the U. S. District Court for the Territory of Alaska, Fourth Division. **[33]**

The foregoing Writ is hereby allowed.

CHARLES E. BUNNELL,
District Judge.

Service of the above and foregoing Writ of Error, by receipt of a copy thereof, is hereby acknowledged this 25 day of September, 1916.

JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant in Error.

Filed in the District Court, Territory of Alaska, 4th Div., Sep. 25, 1916. J. E. Clark, Clerk. By ————, Deputy. **[34]**

United States of America,
Territory of Alaska,
Fourth Judicial Division,—ss.

Citation on Writ of Error.

The President of the United States of America, to Northern Navigation Co., a Corporation, Defendant, and to John K. Brown and McGowan & Clark, Attorneys for the said Defendant, GREETING:

You are hereby cited to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within thirty days from the date of this writ, pursuant to an order allowing a writ of error from a final judgment in favor of said defendant duly entered and made by the District Court for the Territory of Alaska, Fourth Judicial Division, on October 2, 1915, in cause No. 2005, on the records of said District Court, wherein Vachon & Sterling, a copartnership firm composed of Peter Vachon and J. S. Sterling, were plaintiffs, and Northern Navigation Co., a corporation, was defendant, and that you then and there show cause, if any there be, why the said judgment as mentioned and referred to in said order allowing said writ of error, should not be corrected, set aside and reversed, and why speedy justice should not be done to the said Vachon & Sterling, a copartnership firm composed of Peter Vachon and J. S. Sterling.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court

of the United States, this 25th day of September, A. D. 1916.

CHARLES E. BUNNELL,
District Judge.

Service of the above and foregoing Citation, by receipt of a copy thereof, is hereby admitted this 25 day of September, 1916.

JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant in Error.

Filed in the District Court, Territory of Alaska, 4th Div., Sep. 25, 1916. J. E. Clark, Clerk. By ————, Deputy. **[35]**

[Caption and Title.]

Order Enlarging Return Day of Writ of Error.

On application of the said plaintiffs in error, by reason of the great distance between Fairbanks, Alaska, and San Francisco, California, and the delays and uncertainties of the transmission of mail matter between the said points;

IT IS ORDERED that the return day of the writ of error in this cause signed on the 25th day of September, 1916, be enlarged to the 31st day of December, 1916.

Dated at Fairbanks, Alaska, this 25th day of September, 1916.

CHARLES E. BUNNELL,
District Judge.

Entered in Court Journal No. 13, page 591.

Service of the above and foregoing order enlarging return day, by receipt of a copy thereof, admitted this 25 day of September, 1916.

JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant in Error.

Filed in the District Court, Territory of Alaska, 4th Div., Sep. 25, 1916. J. E. Clark, Clerk. By ————, Deputy. [39]

Clerk's Certificate to Transcript.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, J. E. Clark, Clerk of the District Court for the Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of 41 pages, numbered from 1 to 41, inclusive, constitute a full, true and correct transcript of the record on writ of error, in cause No. 2005, Vachon & Sterling, a copartnership firm, composed of Peter Vachon and J. S. Sterling, Plaintiffs and Plaintiffs in Error, vs. Northern Navigation Company, a corporation, Defendant, and Defendant in Error, and was made pursuant to and in accordance with the praecipe of the plaintiff in error filed in this action, and made a part of this transcript, and by virtue of the writ of error, issued in said cause and is the return thereof in accordance therewith; and I certify that the Writ of Error, Citation and Order extending time to file transcript, annexed hereto, are the originals thereof;

and I do further certify that the index thereof, consisting of page i, is a correct index of said transcript on appeal; also that the costs of preparing said transcript and this certificate, amounting to Fourteen and 40/100 dollars ($14.40), has been paid to me by counsel for plaintiff in error in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this court this 30th day of September, A. D. 1916.

[Seal] J. E. CLARK,
Clerk District Court, Territory of Alaska, Fourth Division. **[41]**

[Endorsed]: No. 2870. United States Circuit Court of Appeals for the Ninth Circuit. Vachon & Sterling, a Copartnership Firm Composed of Peter Vachon and J. S. Sterling, Plaintiff in Error, vs. Northern Navigation Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division.

Filed October 27, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Judicial Circuit.

No. 2870.

VACHON & STERLING, a Copartnership Firm Composed of PETER VACHON and J. S. STERLING,

Plaintiffs in Error,

vs.

NORTHERN NAVIGATION CO., a Corporation,

Defendant in Error.

Stipulation as to Printing Record.

It is stipulated between the attorneys for the parties respectively that in printing the record in this case for use in the said court, all captions should be omitted after the title of the cause has once been printed, and the words "Caption and Title" and the name of the paper or document should be substituted therefor; also that after printing the assignment of errors, writ of error and citation, other papers connected with the writ of error need not be printed. Otherwise than as above indicated, we desire that the transcript of the case be printed in its entirety.

THOMAS A. MARQUAM,
LOUIS K. PRATT,
Attorneys for Plaintiffs in Error.
JOHN K. BROWN,
McGOWAN & CLARK,
Attorneys for Defendant in Error.

[Endorsed]: No. 2870. In the United States Circuit Court of Appeals for the Ninth Judicial Circuit. Vachon & Sterling, etc., Plaintiffs in Error, vs. Northern Navigation Co., a Corporation, Defendant in Error. Stipulation as to Printing Record. Filed Oct. 27, 1916. F. D. Monckton, Clerk.

No. 2870

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

VACHON & STERLING, a Copartnership, etc.,
Plaintiffs in Error,

vs.

NORTHERN NAVIGATION CO., a Corporation,
Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

Filed
FEB 10 1917
F. D. Monckton,
Clerk.

T. A. Marquam,
Louis K. Pratt,
Attorneys for Plaintiffs in Error,
Fairbanks, Alaska.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2870.

VACHON & STERLING, a Copartnership Firm, Composed of PETER VACHON and J. S. STERLING, Plaintiffs in Error, v. NORTHERN NAVIGATION COMPANY, a Corporation, Defendant in Error.

Brief of Plaintiffs in Error.

STATEMENT OF CASE.

On the 14th day of March, 1914, the plaintiffs in error filed a complaint in the Clerk's office of the District Court for the Territory of Alaska, Fourth Division, wherein they set forth two causes of action against the defendant in error based on accounts stated. In the first cause of action, as matter of inducement to the allegations of the statement of an account, it was alleged that in March, 1907, the defendant in error entered into a contract with the plaintiffs in error to transport for them by ocean and river steamers 1500 tons of merchandise from Seattle to Chena, Alaska, a town twelve miles southwest from Fairbanks, at the head of navigation on the Tanana River and the terminus of the Tanana Valley Railroad; by the fourth paragraph a failure to deliver 30 boxes of candles, 32 sacks of onions, 49 gunnies of flour, and 21 sacks of potatoes; a controversy over such loss of merchandise, and a statement of an account in July, 1908, adjusting the same at the sum of $853.99. The second cause of action was

the same, except that in the fourth paragraph the merchandise not delivered was 60 cases of eggs for which, at some time between March 16th and April 15th, 1908, an account was stated in the sum of $677.82. Shipments were made at different times during the open season of 1907, and the failure to deliver occurred in connection with different cargoes, which will explain the fact that there were two controversies and two adjustments.

Motions to strike substantially all of the fourth paragraph of each cause of action, and to make more definite and certain, were interposed, and the motion to strike was allowed on the ground that the recitals and details thereof were inappropriate in an action on accounts stated. (Record, pp. 3–12.)

The plaintiffs in error then filed an amended complaint omitting therefrom the parts stricken out, to which defendant in error again filed motions to strike and to make more definite and certain; but the Court overruled the motion to strike, and the other was waived. Next came a demurrer to the amended complaint on the ground that no causes of action were stated and that they were barred by the statute of limitations, but the last was not insisted on at the argument, the defendant in error relying on and the Court yielding to the authority of Vanbebber v. Plunkett (Or.), 38 Pac. 707; S. C., 27 L. R. A. (O. S.) 811. The demurrer was sustained, plaintiffs in error were denied leave to further amend, and the case was dismissed. (Record, pp. 12–24.) For the ground upon which the ruling was made see judgment. (Record, p. 22.)

ASSIGNMENT OF ERRORS.

The plaintiffs below and plaintiffs in error in the appellate court will rely for a reversal of the judgment against them in the said court on the following errors occurring during the progress of the trial, to wit:

1. The Court erred in sustaining the demurrer to plaintiffs amended complaint, interposed by defendant.

2. The Court erred in refusing to allow plaintiffs below to further amend their amended complaint after the Court had sustained a demurrer thereto.

3. The Court erred in its final judgment in adjudging that plaintiffs take nothing by their amended complaint, and dismissing their action and rendering a judgment in favor of the defendant and against the plaintiffs for the costs. (Record, p. 24.)

ARGUMENT.

At the hearing on the demurrer to the amended complaint, the theory of the defendant in error was, that the demands of plaintiffs in error, being founded on claims for unliquidated damages growing out of a failure by a transportation company to deliver merchandise in compliance with its contract, was not the subject of a stated account. The Vanbebber case above cited was accepted by the Court as the controlling authority.

The causes of action out of which the two accounts stated arose, as set forth in the amended complaint, were for breaches of contract by a carrier that had agreed to transport, during the open season of 1907, 1500 tons of merchandise from Seattle, and deliver

the same at Chena, Alaska, the violation consisting in a failure to deliver parts of two separate cargoes or shipments. Had Vachon and Sterling brought an action on their original causes of action, the measure of their recovery would have been referable to a known and fixed standard of comparison, to wit, the market value at Chena, Alaska, of the goods not delivered, less freight. The fact—if it was a fact—that they might have brought an action sounding in tort for unliquidated damages can make no difference; because it is well settled that the shipper can waive the tort, if one was committed, and sue on the transportation contract.

An action on contract for damages against a carrier arising from a breach for failure to deliver, where the measure of damages for goods lost would be the market value at point of destination, is one for liquidated rather than unliquidated damages, when viewed from the standpoint as to whether it did or did not furnish a basis for an account stated. The authorities say that interest can be recovered for the breach of a contract, where the amount of damages is capable of definite ascertainment by reference to market values of the property involved; and we maintain that the same rule should be applied here. The distinction made by the authorities is as between actions for damages where there is a fixed standard or measure of damages (i. e., market value), and those sounding wholly in tort, in which no fixed standard or measure of damages can be resorted to.

The books say that a claim is a liquidated one when either of the parties to the controversy can make it

definite and certain by computation. Vachon & Sterling, by a reference to the invoices, could by mere computation ascertain the cost price of the goods not delivered, also the freight paid thereon by the freight receipts, and, by adding legal interest, fix the amount due them from the Northern Navigation Company. Conceding, for the sake of argument only, that the claims of Vachon & Sterling were—in a very technical sense—unliquidated demands in their inception, they yet became liquidated by the agreement of the parties which resulted in the accounts stated; and in reason this ought to be the holding. The tendency of modern decisions on this subject sustains this view.

We contend that any controversy between parties arising out of monetary transactions is the subject of an account stated which may be sued on as such; but we are not compelled to secure the approval of this contention, in order to succeed on this writ of error.

1 Cyc., pp. 364, 365, 366;
1 Am. & Eng. Enc. Law, pp. 440, 441;
3 Enc. Pldg. & Prac., p. 818;
21 Enc. Pldg. & Prac., p. 1023;
2 Bliss on Code Pl., secs. 13, 14;
2 Sutherland on Damages, sec. 347; 3 Id., sec. 918.
Oberndorfer v. Mayer (Utah), 84 Pac. 1102;
Sawyer v. Robertson (Mont.), 28 Pac. 456;
Terry v. Munger (N. Y.), 24 N. E. 272.

The "Vanbebber" case is distinguishable from the one at bar. When the Northern Navigation Co. failed to deliver Vachon & Sterling's goods at Chena, the relation of debtor and creditor immediately came

into existence between them, the amount of which was the market value of the merchandise lost, at the time and place of delivery—less freight. In the Vanbebber case, Plunkett agreed to build about three-fourths of a mile of fence for Vanbebber, 60 to 80 rods of which was to be of boards and the remainder of what is commonly known as a worm fence. Plunkett failed and neglected to build the fence, and Vanbebber employed Mays to construct it for which service the latter was paid $300 by Vanbebber. Afterward, Vanbebber and Plunkett met in Corvallis, Oregon, talked the matter over, and Plunkett agreed to repay Vanbebber the $300. The action was on account stated, to recover the $300. At the trial Vanbebber was nonsuited, and on appeal to the Supreme Court of Oregon the judgment of the lower court was affirmed. The doctrine of the opinion is, that Vanbebber's cause of action for damages for a breach of contract to build a fence was not for a debt in the restricted sense, but rather was one for unliquidated damages, uncertain in amount and not capable of being made certain by reference to a market value or other known and accepted standard of comparison—and therefore was not the basis of an account stated. The significant fact that the parties themselves made it certain by agreeing that it should be $300 seems to have been ignored altogether. The opinion is too technical; and, besides, it is not sustained by the weight of authority, as is shown by the notes appended to the report of the case in the volume of L. R. A. above cited.

We think the ruling of the trial court on the demurrer to the amended complaint was clearly wrong, and should be reversed.

Respectfully submitted,
THOMAS A. MARQUAM and
LOUIS K. PRATT,
Attorneys for Plaintiffs in Error.

No. 2870

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

VACHON & STERLING (a co-partnership), et al.,

Plaintiffs in Error,

vs.

NORTHERN NAVIGATION COMPANY (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

THOMAS A. McGOWAN,
JOHN A. CLARK,
JOHN KNOX BROWN,
Fairbanks, Alaska,
LLOYD S. ACKERMAN,
San Francisco, California,
Attorneys for Defendant in Error.

Filed
FEB 28 1917
F. D. Monckton, Clerk.

Filed this.....day of February, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2870

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

VACHON & STERLING (a co-partnership), et al.,

Plaintiffs in Error,

vs.

NORTHERN NAVIGATION COMPANY (a corporation),

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Statement of the Case.

Plaintiffs in error appeal to this court from the judgment of the District Court of Alaska, Fourth Division, sustaining the demurrer to the plaintiffs' amended complaint. The action was brought upon an account stated founded upon two causes of action, the first alleging that in March, 1907, the plaintiffs entered into a contract with the Northern Commercial Company to transport for the plaintiffs 1500 tons of merchandise from Seattle, Washington, to Chena, Alaska. That the defendant failed to deliver to plaintiffs part of the 1500 tons of

merchandise and thereupon a controversy arose which was adjusted on or about the 6th day of July, 1908, at Fairbanks and an account was stated between plaintiffs and defendant by which a balance of $853.99 was found to be due from defendant to plaintiffs.

The second cause of action contains the same allegations and alleges a balance found to be due on an account stated arising out of the same shipment amounting to $677.82.

The defendant in the lower court demurred to each account upon three grounds:

1. That the complaint did not state a cause of action.

2. That each cause of action showed upon its face that it was based upon an alleged account stated arising out of the breach of contract, and that a breach of contract cannot be used as the basis of an account stated; and

3. That each cause of action showed upon its face that it was barred by the statute of limitations.

Argument.

The plaintiffs in error state on page 2 of their brief that the defendant in error did not rely upon the statute of limitations but that defendant contended for the first and second grounds of demurrer, which were in effect that no cause of action could be maintained on an account stated arising out

of a breach of contract. It is not true that the defendants in the court below did not rely upon the statute of limitations and there is nothing in the records which supports such a statement. It will be perceived that the ground of demurrer founded upon the statute of limitations was a very essential part of the demurrer for an obvious reason. An examination of the complaint discloses the fact that the contract between the plaintiff and defendant was entered into in March, 1907. The complaint was filed March 14, 1914, more than six years after the date of entering into the contract out of which the cause of action arose. Under Section 838 of the Compiled Laws of the Territory of Alaska an action upon a contract or liability, express or implied, is barred by limitation in six years. Thus it will be seen that unless plaintiffs in error could sustain their position that an account was stated between the parties in the month of July, 1908, for the first cause of action, and April 15, 1908, for the second cause of action, the causes of action arising out of the original contract would have been barred by limitation.

Plaintiffs in error's legal position is that in a case of this kind and account may be stated between the parties even though the cause of action is one for liquidated damages where the amount of damages is capable of definite ascertainment by reference to the market value of the property involved. Although the claim of the plaintiffs when it arose was an unliquidated claim it could be made certain

by determining the cost price of the goods not delivered, the freight paid thereon as shown by the freight receipts and adding legal interest, thereby definitely fixing the amount due to plaintiffs in error by defendant in error.

The authorities cited by counsel for plaintiffs in error do not support this contention. The sum and substance of the principle for which counsel contend amounts to this, that in any case where one person has a claim for unliquidated damages against another the former may by presenting a claim showing the amount of damages which he claims to have sustained put the other to the necessity of disputing the account or accepting the alternative of becoming liable upon an account stated for items of damage.

We will first consider the law on the subject as we find it in the text writers. They state the rule in substantially the same language as is contained in the following quotation:

> "Since an account stated implies some previous indebtedness it follows that an account cannot be stated on unliquidated damages inasmuch as they cannot be considered a subsisting debt and this applies to damages for breach of contract where there has been no actual settlement or adjustment between the parties."

1 Ruling Case Law, p. 208;

1 Corpus Juris, p. 700, sec 308;

1 Cyc., p. 366.

The *Van Bebber* case referred to by counsel in their brief, and stated to be the decision on which the lower court sustained the demurrer to the complaint without leave to amend, is the case of *Van Bebber v. Plunkett,* 26 Ore. 562; 38 Pac. 707; 27 L. R. A. 814. The facts are as stated on page 6 of the brief of plaintiffs in error. The parties to that action agreed to pay a stipulated amount in settlement of an unliquidated claim. The issue involved was as to whether or not an account could be stated upon the facts set forth in the bill of exceptions. The court after stating various definitions of an account stated says:

> "Recurring to the facts of this case, it is apparent that the obligation of the defendants to construct the fence in question was not a debt due and owing from the defendants to plaintiff; it was merely a demand for unliquidated damages for breach of contract, and hence was not a proper subject upon which to base an account stated. To test the question as to the correctness of this conclusion, suppose the plaintiff had sued the defendants upon their agreement to build the fence, and for damages for their default. Would it be a good defense to plead an account stated with reference thereto, without also showing payment of the amount found to be due? In other words, is the mere statement of the account as alleged a discharge of the old cause of action for breach of contract? Unmistakably not. And, inasmuch as a new cause of action is not given until the old is discharged, it follows that the action upon an account stated cannot be maintained. The alleged account stated amounts to an accord, but an accord without satisfaction is no defense

to the original action. An accord with satisfaction, however, gives a new action, and the old is barred. 'A claim or demand may be satisfied by the party delivering, paying, or doing, and the claimant accepting, something different from that which is owing or claimed, if the parties so agree. It is a substantial payment. When such agreement is executed,—carried fully into effect,—the original demand is cancelled, completely satisfied, and extinguished. It is thus discharged by what the law denominates "accord and satisfaction". It is a discharge of the former obligation or liability by receipt of a new consideration, mutually agreed on.' *1 Sutherland, Damages,* 425. Again suppose the plaintiff has sent to defendants a statement in writing of his claim against them for $300 for building this fence, and the defendants had retained it an unreasonable or any length of time without objection, would a promise to pay such sum arise by implication? Undoubtedly not. If such were the rule, it would be an easy matter for any claimant to convert an action for unliquidated damages, whether arising from contract or tort, into an action upon a money demand, wherein it would not be permissible to inquire into the original cause of action. Every person against whom such a claim is made would be compelled to be constantly on the alert, and make due and timely objection, in order to prevent an undue advantage being taken of him. The doctrine of an account stated cannot be carried to this extent. A single item, not of a debt due and owing, but of an unliquidated claim of damages for the breach of a parol or simple contract, cannot form basis for an account stated."

The former case appears to be directly in point and adverse to the contention of plaintiffs in error.

It holds unqualifiedly that the retention by the defendant of a statement of plaintiffs' claim for any length of time without objection would not give rise to a promise to pay the amount by implication.

Another and more recent decision goes still further,

Pudas v. Mattola, 138 N. W. 1052; 45 L. R. A. N. S. 534.

In this case the plate glass front of plaintiff's place of business had been broken. The plaintiff claimed the defendant was one of the parties who committed the damage. Thereafter negotiations were had which plaintiff claims resulted in an agreement on the part of the defendant to pay him a stipulated amount as his share of the damages. Defendant failed to pay and thereafter plaintiff instituted suit against him upon an account stated.

The only issue before the court is whether or not this transaction could be considered as a foundation for an action of an account stated *in assumpsit.* The court says the doctrine of the account stated was originally founded upon the practice among merchants and continues after reviewing the *Van Bebber* case hereinabove referred to (p. 538).

> "The only distinction between the Oregon case above cited and the instant case is that the former grew out of a settlement of unliquidated damages arising from the breach of a contract, and the latter from a plain

settlement of unliquidated damages arising from a tort.

"The basis of an account stated must always be a balance or amount due upon a subsisting indebtedness. This was the principle upon which the action upon an account stated was founded. Therefore *a settlement of an unliquidated claim for damages arising either from the breach of a contract or from a tort cannot become the subject of an account stated.* Our attention is not called to a single authority which holds to the contrary, and in a thorough search we have been unable to find one. It was unanimously held by the court of exchequer, in an opinion written by Lord Abinger, C. B., as follows: 'Then as to the account stated: I have often observed that there is a good deal of confusion in the book on questions of account stated,—not the older books, but the modern ones; they lay down this, that where there is a promise to pay a sum of money as due from A. to B., it is evidence of an account stated, which means this, that the simple promise, if it stand unexplained and uncontradicted, is evidence to go to a jury that the plaintiff claims that sum to be due, and that there are matters of accounts between the parties; it does not go further than that; and it is only when you come to look at the facts on which the promise was made that you are enabled to see whether it is an account stated or not.' Here there was nothing due from the defendant to the plaintiffs at all; the only thing in respect of which they had a claim upon him was upon his promise and they might have had an action against him for not performing that promise, because no doubt it was made upon a good and sufficient consideration; but it was not in the nature of any debt due from the one to the other at all."

Lubbock v. Tribe, 3 Mees. & W. 607-613.

The same doctrine was announced earlier in

Tucker v. Barrow, 7 Barn. & C. 624; 1 Mann & R. 518;

Moody & M., 139, 3 Car. & P. 85; 6 L. J. K. B. 121.

> "In our opinion, upon this record, it may be stated as a matter of law that the claimed settlement relied upon by plaintiff was not an account stated, and no recovery can be had in this action."

Other authorities to the same effect are as follows:

Fraley v. Bispham, 10 Pa. St. 320; 51 Am. Dec. 486;

Note to *Jasper Trust Company v. Laupkin,* 136 Am. St. Rep., pp. 41-42;

Pratt v. Bryant, 20 Vt. 333;

Parker v. Clemons, 80 Vt. 521; 68 Atl. 646;

Charnley v. Sibley, 20 C. C. A. 157; 73 Fed. 980.

Authorities Relied Upon by Plaintiffs in Error.

On page 5 of the brief of plaintiffs in error, certain authorities are referred to to sustain plaintiffs in error's position that the distinction between the cases there cited and the *Van Bebber* case is that in the case at bar the damages were capable of being made certain by reference to the market value or other known and accepted standard of comparison.

It is contended that the *Van Bebber* is opposed to the weight of authority as shown by the notes ap-

pended to the report of the case in Vol. 27, L. R. A. Counsel do not appear to attach sufficient importance to authorities holding contrary to the *Van Bebber* case to refer to them in their brief. There are, however, four cases cited in this note which appear to be in conflict with the *Van Bebber* case. They are the following:

Fred W. Wolf Co. v. Salem, 33 Ill. App. 614;
Dunham v. Griswold, 100 N. Y. 224;
Knowles v. Michel, 13 East 249;
Hanly v. Noyes, 35 Minn. 174.

The first of these cases, *Wolf Co. v. Salem,* 33 Ill. App. 614, was an action by a traveling salesman to cover a balance said to be due for services, commission on sales, and traveling expenses. The court held:

> "When two parties by compromise liquidate and set out at an agreed sum an unliquidated and disputed claim which the one holds against the other, it thus constitutes a valid contract whether the amount stated be paid or not and the only remedy is upon the contract to recover the amount thus liquidated."

The second case, *Dunham v. Griswold,* 100 N. Y. 224, the plaintiff entrusted the defendant with certain securities which were to be sold and the proceeds invested for plaintiff. The defendant sold the securities and converted the proceeds to his own use. He afterwards settled with the plaintiff and an account was stated in which defendant acknowledged that there was $9000 due plaintiff and executed a written agreement to pay that sum. The court held

the plaintiff having made a claim against him, and he having disputed it, and the parties having settled the dispute by agreeing upon the amount due in an account stated which the defendant promised to pay, that promise is founded upon a sufficient consideration and can be enforced against him although he might be able to prove that nothing was in fact due from him.

In *Knowles v. Michel,* 13 East 249; 33 Kings Bench, 366, plaintiff sold to defendant some standing trees. This defendant agreed to pay nine guineas for; the court held that under these circumstances an account stated was shown, there being no other item of account between the parties.

In *Hanly v. Noyes,* 35 Minn. 174; 28 N. W. 189, plaintiff had an unliquidated and disputed claim against defendant for $1500 for extra work done on his house. The parties by way of settlement and compromise liquidated it at $800, which both agreed and assented to as the amount due plaintiff from defendant. On this amount defendant has paid $785. The court held:

> "This was a case of an account stated constituting a valid contract. There was a settlement or liquidation of a disputed account by compromise constituting an obligatory agreement between the parties. There was a promise by the defendant (to pay $800) founded on a good consideration (liquidating a disputed claim) accepted and assented to by plaintiff and

> hence constituting a valid contract whether the amount was paid or not."

If these cases are held to be in conflict with the authorities above cited holding that an account cannot be stated upon an unliquidated demand, then we submit that the latter authorities should be accepted as controlling because they are later in point of time, because the opinions are scholarly and carefully written and because they touch the precise point here involved. To our mind, however, the distinction between the cases quoted and the case at bar is plain. In each of these cases the parties plaintiff and defendant had agreed upon a specific amount to be paid by the plaintiff to defendant in satisfaction of plaintiff's claim. The unliquidated amount became liquidated by specific agreement of the parties. The complaint in the case at bar does not allege that an agreement to pay a stipulated amount was reached between the parties as to the amount due to plaintiffs in error by the defendant in error so as to make a new contract. The allegation of the complaint is that an account "was stated" by virtue whereof the sum of $853.99 on the first count and $677.82 on the second count was found to be due.

To illustrate our point we quote paragraph IV of the amended complaint:

> "That at the close of the open season of 1907 a controversy arose between the plaintiffs and the defendant concerning the failure of the de-

> fendant to deliver to plaintiffs a part of the said 1500 tons of merchandise which was adjusted on or about the 6th day of July, 1908, at Fairbanks, and an account was stated between plaintiffs and defendant concerning such adjustment for loss of merchandise by which a balance of $853.99 was found to be due these plaintiffs from defendant which sum defendant then and thereby agreed to pay."

The inference from this allegation is that the controversy between plaintiffs and defendant was adjusted by the account stated and not by a specific agreement between plaintiffs and defendant that the sum of $853.99 should be paid by defendant to plaintiffs.

In reviewing the authorities relied upon by plaintiffs in error we have their statement of a proposition of law that the authorities make a distinction between actions for damages where there is a standard or measure of damages, i. e. a market value and those sounding wholly in tort in which no fixed standard or measure of damages can be resorted to. In support of this statement of the law counsel cites *1 Cyc.,* pp. 364-365-366. This authority states on page 366,

> "It is held that an unliquidated claim for damages cannot form the basis of an account stated."

1 Am. & Eng. Cyc. of Law, p. 441. Here the rule is stated to be,

> "when the account is stated with reference to a single item that item must be of a character

which creates an actual debt between the parties."

3 Encyc. Pl. & Pr., p. 818. This authority discusses form of action for loss or injury to goods during transportation against a common carrier and holds that the action of tort has been dispensed with and that the plaintiff in such a case may declare in assumpsit on the undertaking to carry and deliver safely. Nothing is stated as to an action upon an account stated.

21 Encyc. Pl. & Pr., 1023. Here it is held that the action of assumpsit will lie even where property has not been converted into money or its equivalent.

We are unable to say in what manner the issue in this case is at all affected by these last two citations. The same observation applies to *2 Bliss of Code Pl.,* Secs. 13 and 14. We admit the rule to be that a person having a cause of action for tort may waive the tort and sue in assumpsit, but this principle has no application upon the question whether or not under the facts as given an action upon an account stated will lie.

In *2 Sutherland on Damages,* Sec. 347, the author discusses the proposition of interest on unliquidated damages and the title of the section is "Not Allowed on Unliquidated Demands." The rule stated is that where the damages though unliquidated can be definitely ascertained from market values, suscep-

tible to easy proof, they are not so uncertain as to preclude the recovery of interest.

In Sec. 918 of the same work the author discusses the measure of damages if goods have a market value in actions against carriers, and states the rule to be that the owner may recover the value at the place of destination less the freight. There is nothing said about an action upon an account stated.

Oberndorfer v. Moyer, 84 Pac. 1102. In this case defendant agreed that plaintiff, a mining broker, should purchase stock from him. Plaintiff purchased stock of the agreed value of about $6000, and defendant paid plaintiff on account of such purchase $2500. Defendant refused to pay the balance. Plaintiff after making repeated demands on defendant for payment sold the stock and, after crediting the purchase price, instituted action for the balance of $726.90. A suit was brought on an account stated in this sum. The court holds that the action is properly brought upon an account stated and says:

> "The general rule as to what constitutes an account stated is tersely, and, as we think, correctly stated in 1 Cyc. 364 as follows: 'In general terms where an account is rendered by one person to another showing a balance due from the one to the other, and the indebtedness thus expressed is acknowledged to be due by the person against whom the balance appears, or where parties have previous transactions agree upon a balance as due from one to the other, this will constitute an account stated." 1 A. & E. (2nd Ed.) 427 and cases cited; 13 Ency. Pl. & Pr. 87; 2 Greenleaf on Ev. 126.

Sawyer v. Robertson, 28 Pac. 456, appears to be against the contention of plaintiffs in error. It was an action for conversion and the court said:

> "The cause of action arose, according to the complaint, not by virtue of any covenant or agreement or contractual relation existing between the parties, but by the commission of a tort. The remedy for such an injury lies in the application of principles of law which have been aptly termed by an eminent and discriminating jurist 'non-contract law'."

There is nothing in the opinion concerning an account stated.

Terry v. Munger, 24 N. E. 272. This case does not discuss the question of account stated but declares the principle that an owner of goods wrongfully taken may waive the tort and sue on an implied contract of sale.

It will thus be seen that the authorities cited by plaintiffs in error to sustain the contention which they make in their brief are not at all in point. It is not the law that an unliquidated demand may be made the subject of an account stated where there is a fixed standard or measure of damages whereby the amount of damage could definitely be ascertained. An account stated presupposes a fixed amount agreed to be paid and undisputed by the defendant and even in the authorities above referred, which might be construed as favorable to plaintiffs' contention, the unliquidated demand became liquidated by the direct promise of the defendant to pay

the amount whereby a new contract was made taking the place of the unliquidated demand.

In our opinion after a careful investigation of the authorities the complaint in the case at bar would be sufficient in an action upon a liquidated demand, but that in a case such as the one at bar, where the demand was unliquidated, the plaintiff must show the making of a new contract whereby the unliquidated damages became liquidated and whereby the defendant agreed to pay to plaintiffs the precise amount found to be due. In other words an account cannot be stated upon the adjustment but can only be stated upon the promise of the defendant to pay a certain amount admitted to be due to plaintiff. To illustrate our point, paragraph 4 of the complaint would only be sufficient if it was pleaded thus:

> "That at the close of the open season of 1907 a controversy arose between the plaintiffs and the defendant concerning the failure of defendant to deliver to plaintiffs a part of the said 1500 tons of merchandise, which controversy was settled on the 6th day of July, 1908, at Fairbanks, whereby the defendant promised and agreed to pay to the plaintiff the sum of $853.99, and that thereafter an account was stated between plaintiffs and defendant for the sum of $853.99, no part of which sum has been paid."

To constitute a liquidated demand a new contract must be made as of the date that the claim of plaintiff was fixed and agreed upon.

We submit the ruling of the trial court on the demurrer was correct and the judgment should be affirmed.

Dated, San Francisco,
February 26, 1917.

Respectfully submitted,

THOMAS A. MCGOWAN,
JOHN A. CLARK,
JOHN KNOX BROWN,
LLOYD S. ACKERMAN,
Attorneys for Defendant in Error.

No. 2871

United States

Circuit Court of Appeals

For the Ninth Circuit.

WOO HOO, on Behalf of WOO DAN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern Division of the Northern District of California, First Division.

Filed
NOV 1 5 1910
F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the District Court of the United States, for the Northern District of California, First Division.

No. 16,026.

In the Matter of WOO DAN, on Habeas Corpus.

Names and Addresses of Attorneys.

ALBERT C. AIKEN, Esq., San Francisco, Attorney for Petitioner.

UNITED STATES ATTORNEY, San Francisco, Attorney for Respondent.

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California.

Clerk's Office.

No. 16,026.

In the Matter of the Application of WOO HOO for a Writ of Habeas Corpus on Behalf of WOO DAN.

Praecipe for Transcript of Record.

To the Clerk of Said Court:

Sir: Please issue for use on appeal to the Circuit Court of Appeals for this District copies of the following papers, filed herein, with their indorsements:

1. Petition for Writ of Habeas Corpus.
2. Demurrer to Petition for Writ of Habeas Corpus.
3. Order Sustaining Demurrer, and Denying Motion for Writ of Habeas Corpus.

4. Substitution of Attorneys.
5. Petition for Appeal.
6. Assignment of Errors.
7. Order Allowing Appeal.
8. Notice of Appeal.

ALBERT C. AIKEN,
Attorney for Petitioner and Appellant.

[Endorsed]: Filed Sep. 16, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

In the District Court of the United States, in and for the Northern District of California, First Division.

In the Matter of the Application of WOO HOO for a Writ of Habeas Corpus for and on behalf of WOO DAN.

Petition for a Writ of Habeas Corpus.

To the Honorable M. T. DOOLING, Judge of the District Court, in and for the Northern District of California.

Petitioner respectfully shows:

I.

That your petitioner Woo Hoo is of Chinese descent and is a regularly domiciled resident and merchant and was a merchant engaged exclusively in buying and selling merchandise at a fixed place of business in the City and County of San Francisco, State of California, continually for more than one year prior to the application of the said Woo Dan to enter the United States hereinafter set forth and

*Page-number appearing at foot of page of original certified Transcript of Record.

during which time he did not engage in the performance of any manual labor except as such that was necessary in the conduct of his business as such merchant.

II.

That the said Woo Dan the detained person on whose behalf this petition is made is the minor son of your petitioner and is under the age of 21 and over the age of 18.

III.

That the said Woo Dan is unlawfully imprisoned, detained, confined and restrained of his liberty by Edward White, Commissioner of Immigration at the Port of San Francisco, at the Immigration Station of the United States at Angel Island or at [2] some other place in the northern district of California, and is about to be deported from the United States to China.

IV.

That the illegality of such imprisonment, restraint, detention and confinement consists in this, to wit:

That the said Woo Dan made application to be admitted to the United States at the Port of San Francisco, as a minor son of your petitioner; that subsequently to said application to be so admitted to the United States and at all times, the said Woo Dan was refused and denied a fair hearing in good faith by the Secretary of Labor of the United States, and by the Commissioner of Immigration at the Port of San Francisco, and was, by a manifest abuse of the discretion committed to them by law and through errors and mistakes of law, and against the spirit

and letter of the law, denied by said Secretary and said Commissioner, the right to enter the United States; and in that respect your petitioner alleges:

1. That the said Woo Dan during the month of December 1915, arrived on the steamer "Chiyo Maru" at the Port of San Francisco from China and made application to the Commissioner of Immigration at the Port of San Francisco, for admission to the United States as the minor son of your petitioner.

That thereafter a hearing was conducted by the Immigration authorities at the Port of San Francisco touching upon the right of the said Woo Dan to enter the United States as the minor son of a merchant, to wit, as the minor son of your petitioner; that at such hearing testimony and documentary evidence was submitted in support of said application and that such testimony and documentary evidence clearly and conclusively showed and established that this petitioner was and had been [3] for more than one year prior thereto a regularly domiciled resident and merchant engaged in buying and selling merchandise at a fixed place of business in the City and County of San Francisco, State of California, and that he had not engaged in the performance of any manual labor except as such that was necessary in the conduct of his business as such merchant; that said testimony and documentary evidence clearly and conclusively showed and established that the said Woo Dan was the minor son of your petitioner; that no evidence was introduced, produced or considered by said Immigration authorities rebutting or denying or tending to rebut or deny the testimony

and evidence produced in support of said application as above set forth.

That petitioner is informed and believes and therefore alleges that it was and is admitted and conceded by said Commissioner and the said secretary that the petitioner Woo Hoo is a merchant, regularly domiciled and doing business at a fixed place of business in the United States as herein before set forth; that after the conclusion of the said hearing said Commissioner of Immigration at the Port of San Francisco, refused and denied the said Woo Dan the right to enter the United States but on the contrary ordered that he be deported from San Francisco to China without having any evidence whatever on which to base said refusal and said order, but on the contrary that said refusal and order was made after the said Woo Dan showed by uncontradicted and convincing evidence that he was the minor son of a merchant, regularly and lawfully domiciled and doing business as such merchant in the United States to wit, as the minor son of your petitioner.

2. That the said Woo Dan at the time of said application for admission to the United States was and he claimed to be [4] over the age of 18 years, and under the age of 21 years, and was before coming to the United States not wholly dependent upon his said father.

That petitioner is informed and believes and upon such information and belief alleges that the said Commissioner upon a claim and finding that the said Woo Dan was over the age of 18 years and under the age of 20 years and was not wholly dependent upon

his said father, erroneously concluded as a matter of law that the said Woo Dan was not entitled to enter the United States and upon such conclusion and upon no other ground the said Commissioner thereupon made his decision and order excluding the said Woo Dan from the United States.

3. That thereafter an appeal was taken on behalf of the said Woo Dan from said decision and order of exclusion of said Commissioner to the Secretary of Labor.

That thereafter said Secretary dismissed said appeal and approved said decision and order of exclusion so made by the Commissioner as aforesaid.

V.

That all orders, decisions or judgments made or rendered by said secretary or by any of the officials of the Department of Labor acting by the authority of said secretary pertaining to the application of the said Woo Dan to enter the United States and the denial thereof, are in possession of and under the sole control of said secretary and are, as petitioner is informed and believes, in Washington, D. C., at the present time; that the record of the testimony and evidence submitted to and considered by the said Commissioner and the said secretary concerning said application is in the possession of and under the sole control of the said Commissioner and the said secretary and petitioner at this time is unable to secure [5] a copy of such orders, decisions, or judgments or any part thereof, or to attach a copy thereof to this petition, and petitioner at this time is unable to secure a copy of the record of the said testimony and

evidence hereinabove referred to or any part thereof or to attach a copy thereof to this petition at this time, but petitioner hereby makes special reference herein to such orders, decisions and judgments and said evidence and testimony and asks leave of this Honorable Court to so amend this petition so as to contain such copies of said orders, decisions, and judgments and said evidence and testimony in the event he should during the pendency of these proceedings, secure such copy.

VI.

That the said Woo Dan has exhausted all his rights and remedies and has no further remedy before the Department of Labor and unless the Writ of Habeas Corpus issue out of the court as prayed for herein directed to Edward White, Commissioner of Immigration as aforesaid, in whose custody the body of the said Woo Dan now is, the said Woo Dan will be forthwith deported from the United States to China without due process of law.

WHEREFORE your petitioner prays that a Writ of Habeas Corpus be issued by this Honorable Court directed to and commanding the said Edward White, Commissioner of Immigration at the Port of San Francisco, to have and produce the body of the said Woo Dan before this Honorable Court at its courtroom in the City and County of San Francisco, Northern District of California, at the opening of court on a day certain in order that the alleged cause of imprisonment, detention, confinement and restraint of the said Woo Dan and the legality [6] or illegality thereof may be inquired into and in or-

der that, if the said imprisonment, detention, confinement and restraint are unlawful and illegal, the said Woo Dan be discharged from all custody and restraint.

Dated this 15th day of May, 1916.

CATLIN, CATLIN & FRIEDMAN,
Attorneys for Petitioner.

United States of America,
Northern District of California,—ss.

Woo Hoo, being duly sworn, deposes and says: That he is the petitioner named in the foregoing petition; that he has heard read the said petition and understands the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief and as to those matters he believes it to be true.

WOO HOO.

Subscribed and sworn to before me this 15th day of May, 1916.

[Seal] P. J. HASKINS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed May 16, 1916, W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [7]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 16,026.

In the Matter of WOO DAN, on Habeas Corpus,

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration at the Port of San Francisco, in the Northern District of the State of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

JNO. W. PRESTON,
United States Attorney.
CASPER A. ORNBAUN,
Asst. United States Atty.,
Attorneys for Respondent.

[Endorsed]: Filed June 3, 1916. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [8]

In the District Court of the United States, in and for the Northern District of California, First Division.

No. 16,026.

In the Matter of WOO DAN, on Habeas Corpus.

Order Sustaining Demurrer to and Denying Petition for a Writ of Habeas Corpus.

CATLIN, CATLIN & FRIEDMAN, Attorneys for Petitioner.

JOHN W. PRESTON, Esq., United States Attorney, and CASPER A. ORNBAUN, Esq., Assistant United States Attorney, Attorneys for Respondent.

ON DEMURRER TO PETITION FOR A WRIT OF HABEAS CORPUS.

The demurrer to the petition for a writ of habeas corpus herein is sustained, and the said petition denied.

June 29th, 1916.

M. T. DOOLING,
Judge.

[Endoresd]: Filed Jun. 29, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [9]

In the District Court of the United States, Northern District of California.

In the Matter of the Application of WOO HOO for a Writ of Habeas Corpus on Behalf of WOO DAN.

Substitution of Attorneys.

Albert C. Aiken, Esq., is hereby substituted as attorney for Petitioner herein.

Dated July 7th, 1916.

WOO HOO,
Petitioner.

We hereby agree to the above substitution.

Dated July 7th, 1916.

CATLIN, CATLIN & FRIEDMAN.

I hereby accept the above substitution, as attorney for Petitioner.

Dated July 7th, 1916.

ALBERT C. AIKEN.

Service of the within sub. of Attys. by copy admitted this 7 day of July, 1916.

JOHN W. PRESTON,
Attorney for Respondent.
C.G.H.,

[Endorsed]: Filed Jul. 7, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

In the District Court of the United States, Northern District of California.

In the Matter of the Application of WOO HOO for a Writ of Habeas Corpus for and on Behalf of WOO DAN.

Petition for Appeal.

To Hon. Judge of the District Court of the United States, Northern District of California.

WOO HOO, the petitioner herein, feeling ag-

grieved by the order of judgment of this court, made and entered herein on June 29, 1916, denying the petition for a writ of habeas corpus herein, in which said order certain errors were made to the prejudice of this appellant, all of which will more fully appear from the assignment of errors filed herewith; does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from said order and judgment and from each and every part thereof.

And appellant prays that his appeal be granted to the said United States Circuit Court of Appeals, for the correction of the errors so complained of; and further that a transcript of the record, proceedings and papers in the above-entitled cause upon which said order and judgment was made, as shown by the praecipe, duly authenticated may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And petitioner further prays that the custody of the said Woo Dan be not disturbed, and that he be not taken from the jurisdiction of said court during the pendency of this appeal unless by order of this court or the said court of Appeals.

Dated, San Francisco, July 7th, 1916.

ALBERT C. AIKEN,

Attorney for Petitioner and Appellant. [11]

Receipt of copy of within Petition is hereby acknowledged this 7th day of July, 1916.

JOHN W. PRESTON,

U. S. Attorney.

C.G.H.

[Endorsed]: Filed Jul. 7, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[12]**

In the District Court of the United States, Northern District of California.

In the Matter of the Application of WOO HOO for a Writ of Habeas Corpus for and on Behalf of WOO DAN.

Assignment of Errors.

Now comes Woo Hoo, the petitioner and appellant herein, and by his attorney, Albert C. Aiken, Esq., his attorney, and in connection with his Petition for the Allowance of an appeal herein, hereby assigns the following errors, which, he says, occurred upon the hearing accorded Petitioner in the above-entitled cause on demurrer, and upon which he will rely on his appeal to the United States Circuit Court of Appeals, to wit:

1. That the Court erred in sustaining the demurrer to the Petition.

2. That the Court erred in denying the Petition.

3. That the Court erred in refusing to issue the writ of habeas corpus.

4. That the Court erred in sustaining the demurrer to the Petition and in refusing to issue the said writ as prayed for, inasmuch as it appears on the face of said Petition that the said Woo Dan did not have a fair and unprejudiced hearing; that he is detained, confined and restrained of his liberty by the Commissioner of Immigration at the Port of San Francisco, and is about to be deported to

China by the Secretary of Labor, through a manifest abuse of discretion, and through mistake of law on the part of said officials, all contrary to the spirit and letter of the law, and without due process of law, and without first having accorded him a fair hearing in good faith as is given by law. **[13]**

5. That said District Court erred in refusing to take jurisdiction, and to issue the said writ of habeas corpus, inasmuch as the Petition praying for said writ states facts sufficient to justify its issuance, and a further hearing upon the return of the said writ.

WHEREFORE petitioner and appellant prays that the said judgment and order of the said District Court, entered on June 29, A. D. 1916, sustaining the demurrer to the said Petition and denying the application for the issuance of a writ of habeas corpus on behalf of said Woo Dan, be reversed, and that this case be remitted to the lower court with instruction to issue the said writ as prayed for, and to discharge the said Woo Dan from custody, and to grant him a trial upon the said writ.

ALBERT C. AIKEN,
Attorney for Petitioner and Appellant.

Service of the within Asst. of Errors by copy admitted this 7 day of July, 1916.

JOHN W. PRESTON,
Attorney for Respondent.
C. G. H.

[Endorsed]: Filed Jul. 7, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. **[14]**

In the District Court of the United States, Northern District of California.

In the Matter of the Application of WOO HOO for a Writ of Habeas Corpus for and on Behalf of WOO DAN.

Order Allowing Appeal.

On this 7th day of July, A. D. 1916, came Woo Hoo, Petitioner and by his attorney Albert C. Aiken, Esq., and presented his Petition praying for allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be prosecuted on his behalf, and praying that a transcript of the record upon which the judgment herein was rendered, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals, and that such further proceedings may be had in the premises as may be proper, and having presented to the Court at the same time, an assignment of errors, and having moved the Court for an order allowing said appeal, and staying proceedings during the pendency of said appeal:

IT IS HEREBY ORDERED that said appeal be and it is hereby allowed, and that a certified transcript of the record and all proceedings herein, as requested by the praecipe, be properly prepared and transmitted by the clerk to the United States Circuit Court of Appeals for the Ninth Circuit in the time prescribed by law.

And it is further ordered that the custody of the said Woo Dan be not changed, and that he be not

removed from the jurisdiction of this Court or of the said Ninth Circuit, unless by order of this court or of the said United States Circuit Court of Appeals.

Done in open court this 7th day of July, 1916.

WM. W. MORROW,
Judge. [15]

[Endorsed]: Filed Jul. 7, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [16]

In the District Court of the United States, Northern District of California.

In the Matter of the Application of WOO HOO for a Writ of Habeas Corpus for and in Behalf of WOO DAN.

Notice of Appeal.

To the Clerk of the Above Court, and to Hon. JOHN W. PRESTON, United States Attorney for the Northern District of California.

You and each of you will please take notice that Woo Hoo, the Petitioner herein, does hereby appeal to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, from the order and judgment entered herein on June 29th, 1916, denying the application of Petitioner for a writ of habeas corpus for and on behalf of said Woo Dan, and sustaining the demurrer to the Petition herein filed by said Woo Hoo, praying for the issuance of the said writ.

Dated July 7th, 1916.

ALBERT C. AIKEN,
Attorney for Said Petitioner.

Service of the within Notice of Appeal by copy admitted this 7 day of July, 1916.

JOHN W. PRESTON,
Attorney for Respondent.
C. G. H.

[Endorsed]: Filed Jul. 7, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [17]

In the District Court of the United States, in and for the Northern District of California.

In re WOO DAN, on Habeas Corpus.

Bond on Appeal from Order Sustaining Demurrer to the Petition of Woo Hoo.

KNOW ALL MEN BY THESE PRESENTS: That we, Woo Hoo, as principal, and National Surety Company, a corporation, organized and existing under the laws of the State of New York as surety, are jointly and severally held and firmly bound unto the United States of America in the sum of Five Hundred Dollars, lawful money of the United States, to be paid to the said United States of America, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our hands and seals, and dated the 28th day of October, in the year of our Lord one thousand nine hundred and sixteen.

The condition of the above obligation is such, that, whereas said Woo Hoo has taken an appeal to the Circuit Court of Appeals to reverse an order sustain-

ing the demurrer to the Petition for the issuance of a writ of habeas corpus herein, directed to Hon. Edward White, Commissioner of Immigration, looking to the production in court of the said Woo Dan, and from the order dissolving the order to show cause issued upon the said Petition, which said orders were rendered and entered by the said District Court of the United States, for the Northern District of California, [18] in the above-entitled proceeding on the 29th day of June, 1916.

Now, therefore, the condition of the above obligation is such, that, if the above-named Woo Hoo, Petitioner herein, shall prosecute said appeal to effect, and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and effect.

Dated San Francisco, Cal., October 28th, 1916.

WOO HOO. (Chinese Characters)
NATIONAL SURETY COMPANY,
[Seal] By FRANK L. GILBERT,
Its Attorney in Fact.

State of California,
City and County of San Francisco,—ss.

On this 28th day of October in the year one thousand nine hundred and sixteen, before me, M. A. Brusie, a notary public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared Frank L. Gilbert known to me to be the person whose name is subscribed to the within instrument as the Attorney in Fact of the National Surety Company, the corporation described in the

within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and the said Frank L. Gilbert acknowledged to me that he subscribed the name of the National Surety Company thereto as principal and his own name as Attorney in Fact.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, State of California, the day and year in this certificate first above written.

[Seal] M. A. BRUSIE,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Sept. 24, 1918.

Approved as to form this 28th day of Oct., 1916.

CASPER A. ORNBAUN,
Assistant U. S. Atty.

Approved Oct. 28th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 28, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [19]

In the District Court of the United States, in and for the Northern District of California.

In the Matter of WOO DAN, on Habeas Corpus.

Stipulation and Order Waiving Printing Documentary Evidence and That Same be Transmitted in Original Form.

It is hereby stipulated that the documentary evi-

dence considered by the Court on the hearing of the Demurrer to the Petition for Issuance of Writ of Habeas Corpus, and on the hearing of the Order to Show Cause herein, may be transmitted to the Court of Appeals in the matter of the appeal from the orders sustaining the said demurrer and dissolving the said order to show cause in the form as the same is filed herein, and the printing of the same is hereby waived.

Dated October 28, 1916.

JNO. W. PRESTON,
U. S. District Attorney.
CASPER A. ORNBAUN,
Assistant U. S. Atty.
ALBERT C. AIKEN,
Attorney for Petitioner.

It is hereby ordered that the original documents filed herein as exhibits or evidence on the hearing on demurrer and order to show cause, be transmitted to the Court of Appeals in their form as filed, and without printing the same.

Dated October 28th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 28, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [20]

In the District Court of the United States, in and for the Northern District of the State of California, Southern Division, Div. No. 1.

No. 16,026.

In the Matter of WOO DAN, on Habeas Corpus.

Order Extending Time to Docket Case.

Good cause appearing therefor, and upon motion of Albert C. Aiken, Esquire, Attorney for the petitioner and appellant herein, it is hereby ordered that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals, may be and the same is hereby extended for the period of fifteen days from and after the date hereof.

Dated this 16th day of October, A. D. 1916.

M. T. DOOLING,

United States District Judge now Presiding in the Above-entitled Court.

The foregoing extension is hereby consented to.

JOHN W. PRESTON,

United States Attorney.

C. G. H.

[Endorsed]: Filed Oct. 16, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [21]

Certificate of Clerk U. S. District Court as to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States of America, for the Northern

District of California, do hereby certify that the foregoing 21 pages, numbered from 1 to 21, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the matter of Woo Dan, on Habeas Corpus, No. 16,026, as the same now remain on file and of record in the office of the clerk of said District Court; said transcript having been prepared pursuant to and in accordance with the "Praecipe" (copy of which is embodied herein), and the instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing Transcript on Appeal is the sum of Ten Dollars and Twenty Cents ($10.20), and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal, issued herein (page 23).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 31st day of October, A. D. 1916.

[Seal] WALTER B. MALING,
Clerk.
By T. L. Baldwin,
Deputy Clerk. [22]

Citation on Appeal—Original.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, and to JOHN W. PRESTON, Esq., U. S. Attorney, His Attorney, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, wherein Woo Hoo, on behalf of Woo Dan, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, this 16th day of September, A. D. 1916.

M. T. DOOLING,
United States District Judge.

[Endorsed]: No. 16,026. United States District Court, for the Northern District of California. In the Matter of Application of Woo Hoo, for Writ of H. C., on Behalf of Woo Dan. Citation on Appeal.

Filed Sep. 16, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Service of the within Citation by copy admitted this 16 day of Sept., 1916.

JOHN W. PRESTON,
Attorney for Appellee.

C.G.H.

[Endorsed]: No. 2871. United States Circuit Court of Appeals for the Ninth Circuit. Woo Hoo, on Behalf of Woo Dan, Appellant, vs. Edward White, as Commissioner of Immigration at the Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern Division of the Northern District of California, First Division.

Filed October 31, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2871

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WOO HOO on Behalf of WOO DAN,
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco.
Appellee.

Brief of Plaintiff and Appellant

ALBERT C. AIKEN,
Attorney for Plaintiff and Appellant.

Filed this_____day of_____A. D. 1917.

FRANK D. MONCKTON, Clerk.

By _____Deputy Clerk.

BRIEF AND TRANSCRIPT PRINTING CO. SAN FRANCISCO

Filed
FEB 23 1917
F. D. Monckton

No. 2871

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of WOO DAN
On Habeas Corpus.

BRIEF OF PETITIONER AND APPELLANT.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court sustaining a demurrer to the Petition praying for the issuance of a writ of habeas corpus, and denying the prayer of the said Petition. (Record p. 10).

Woo Dan the minor son of Woo Hoo applied for admission to land in the United States as the minor son of a regularly domiciled merchant. This application was denied by the Commissioner on the ground that applicant had failed to show that he was such minor. Appeal was taken to the Secretary of Labor, where the excluding decision was affirmed. Then the Petition for said writ was filed, and on denial thereof, this appeal was duly taken.

APPELLANT'S CASE.

Appellant urges the following propositions in sup-

port of this appeal:

1st. That the Petition filed (Trans. 2) states facts sufficient to justify the issuance of the writ of habeas corpus and the framing of issues tendered by the Petition.

2nd. a. There was absolutely no evidence to support the decision of the Commissioner that Woo Dan is not the minor son of Woo Hoo, and there is overwhelming evidence that he is such son.

b. That Inspectors Scully and Lorenzen, in the conduct of the examinations, displayed such an implacable animus toward the applicant, that he was deprived of the benefit of a fair and unprejudiced consideration of his case.

That the said Scully deliberately sought, on at least two occasions, to secretly falsify and distort the record to the prejudice of applicant.

That the said Lorenzen reported to the Commission that the identifying witness Woo Wai Gim was discredited in that, among other things, he had testified that he had never before appeared as a witness, whereas in matter of fact he testified (*p.* 8 *of testimony*) that he had testified, though not very often.

c. That the Inspectors burdened applicant with repeated, and unnecessary examinations, during which he was assailed by first one then another with a multitude of questions wholly immaterial and beyond the possibility of either corroboration or con-

tradiction, and intended only to confuse and exhaust him. In all he was subjected to six distinct examinations, some of them at great length.

d. Inspector Lorenzen reported to the Commissioner that the discrediting of Woo Wee Gim left applicant without competent evidence to establish his relationship to Woo Hoo. (*Rec. p.* 62-3), whereas the testimony of Woo Mun the last witness, furnished perfect identification, but was given no weight whatever, even after the record was corrected, as hereafter appears.

ARGUMENT.

As to the first point that the Petition states facts sufficient to justify the issuance of the writ:

The hearing in the District Court was on demurrer to the Petition. Such a general demurrer of course admits the truth of the allegations of the material facts. The facts averred show: That applicant was a minor son of a regularly domiciled merchant in the United States; that on his application to be landed as such he was detained and restrained of his liberty by appellee: That applicant was denied a fair hearing on his application to land, and that his hearing was not in good faith and that he was denied the right to land. That at the hearing before the Immigration Bureau, the evidence introduced showed him to be the minor son of Woo Hoo, a domiciled merchant in San Francisco, and that no

testimony was introduced to deny or rebut such evidence in support of said application. That on such hearing the said Commissioner admitted that said Woo Hoo was such domiciled merchant: that said Woo Dan was denied landing, and that such decision was without support in the evidence. Then follows the usual allegations showing appeal to Washington, the affirmance of the order of exclusion; that applicant has exhausted all his remedies, and will be deported unless the Court shall grant the writ asked for; that all the papers and record in the hearing are without the knowledge or control of Petitioner, and in the possession of the Secretary of Labor, and he asks permission to amend his Petition and introduce them in due season. (*Trans. p.* 2-7).

We submit that these allegations establish a prima facie case, as against the general demurrer and entitled the Petitioner to have the case go to issue.

The admitted averment of importance is that Woo Dan was the minor son of Woo Hoo, a regularly domiciled merchant in the United States, and this, under the Immigration Rule in force, entitled the applicant to land. (*Chinese Immigration Rules* 9*a*, *In re Gue Lim* 176 *U. S.* 459).

If however the averments were not sufficient in any detail Petitioner was entitled to an opportunity to amend in such respect. He was however peremptorily dismissed from the Court. (*Trans. p.* 10).

2. However at the hearing in the District Court, the Court permitted the admission and consideration

of the evidence and record taken before the Commissioner, and we respectfully submit that it fully substantiates the averments of the Petition.

A. The Commissioner based his excluding decision on the recommendations of Inspectors Scully and Lorenzen. These recommendation under special order (*Record p.* 69) were not available for examination by counsel until this time, and as these constitutes the findings of fact, it was not until the Court was reached that it was known how unjust some of these findings were. The Commissioner reached the conclusion that Woo Dan was not the son of Woo Hoo, thus following the report of Inspector Scully who reported that Woo Dan was the son of the witness Woo Wee Gim, (*Record p.* 44), and he carefully selects the following discrepancies, in the evidence, which to his mind are sufficient to prove his findings (*Rec. p.* 59).

a. The father testified there was but one ancestral hall in their home village, (*p.* 13).

The son testified that there were two ancestral halls, (*p.* 30).

In explanation of this it will be noted that the father testified later on page 87 that he had since been informed that a second ancestral hall had been built since he had left the village, 20 years since. But to this testimony, the Inspector gives no credit.

b. Woo Wai Gim testified that he visited applicant's home in the second row, 4th house, (*p.* 9).

Applicant testified that he lived in the 3rd row 4th house. (*p.* 27).

c. Father testified that he owned no other property than two houses, in one of which they lived, (*p.* 12).

The son testified that all the property they had were two houses, and a small vegetable garden. (*p.* 28).

However in explanation of this the father later testified that he had once "mortgaged" a small piece in addition to the two houses, and that they may still be holding it. (*p.* 89)

These constitute the discrepancies picked out by the Inspectors from amid the great mass of testimony, upon which they base their conclusion that all three of the witnesses are testifying falsely. To our mind they are readily reconciled by one seeking for the exact truth, in the fact that each witness is testifying of conditions that prevailed at widely different times. The father was last in his village twenty years ago. The visit of Woo Wai Gim was in 1909 or about six years ago, while Woo Dan testifies to things he knew as of *to-day*. Not only might conditions have changed throughout these years, but through the stride of years the human mind is not infallible, and the honest seeker after the truth will often very wisely touch lightly upon immaterial details, as to which two minds may have been very differently impressed, or one may not have been im-

pressed at all, while to another the impression may have been deep and lasting. It is indeed a matter of great wonderment to us that from the great mass of testimony, and the thousands of questions asked, the industry of Inspector Scully should have been rewarded with finding so few discrepancies in the testimony. And we believe that he does the applicant a grave injustice when he makes no mention of the wonderful coincidence of the facts testified to by them. Even discrepancies often prove the truthfulness and honesty of a witness, just as an exception may indicate a rule. It is only by an investigation of the entire body of the testimony, giving to each item its bearing upon the whole, that we can arrive at the real and essential truth. So in this case, it appears as inconceivable that the evidence of Woo Dan should in a hundred details corroborate the evidence of the others, whom he had never seen; and especially that he should be corroborated by the evidence of Woo Mun, whom he thought in China, and whose unexpected return, made him available as a witness. The theory of Inspector Scully that Woo Dan was in fact Woo Sick Ngim, the son of Woo Wai Gim, refused landing in 1910, can be justified only upon the assumption that every witness was so successfully coached that he could survive the grilling examinations without it becoming apparent. In view of the fact, finally determined, that Woo Mun had had no opportunity of meeting with Woo Dan, and that his testimony corroborated that given before

his arrival here from China, it appears idle for the Inspectors to have remained firm in their decision based on the universal perjury of every witness in the case. There is not one scintilla of evidence in the record to support the conclusion that Woo Dan is the son of Woo Wai Gim. The conclusion is based wholly on suspicion and conjecture, and we venture the belief that Inspector Scully would fail to advance the belief on cross examination under oath.

B. Applicant's testimony is attacked as untrue because it is stated by Inspector Scully that although Applicant testified that he had no brother, yet a letter was found *"in his trunk"* addressed to *"Woo Dock Wo, My Brother"* (p. 115-16).

The Inspector thereupon concluded of record that applicant falsified, that he had a brother and that in fact he was *Woo Sick Ngim,* son of Woo Wee Gim, by reason of his likeness to a photograph of the latter.

Relative to the finding of this so-called letter *"in* the trunk" of applicant, we wish to call attention to the correspondence and facts surrounding the building up of the record relating to it. (*See p. 46 of Record*). It is noted that Inspector Scully stated to applicant that the letter had been found *in his trunk,* and asked for an explanation of it, how it came there, and about his knowledge of the various persons named in it, all the time giving emphasis to the fact that its presence *inside* the trunk made the

"find" significant. (*p.* 46). By mere accident it came to the knowledge of counsel for applicant that the letter had been found by the Inspector *outside* and not *inside* the trunk, as the Inspector would have the record show; and that the Inspector had, as matter of fact, found *inside* the trunk some books and chops, (wooden stamps) carrying the name of *Woo Dan* in chinese characters, and that these stamps bore the appearance of having had considerable usage. These books and stamps had been suppressed from the record by the Inspector, and the false statement that the letter had been found *inside* the trunk was placed in the record.

Upon ascertaining this fact counsel addressed the Commissioner the letter found in the record of exhibits (*page* 74), asking that the record be corrected to show the actual facts, and protesting the unfairness of the proceeding. The only action brought forth by this letter was a demand from the Commissioner, that the attorneys should disclose the source of their information, giving no assurances whatever that justice would be done the applicant by the making of the proper correction. Counsel thereupon addressed the Commissioner a second communication, (*p.* 96) again protesting the unfairness of such falsification of the record by Inspector Scully, and again demanded that action to have it corrected be taken. No direct reply was made to this letter, but Inspector Scully placed a communication in the record (*p.* 53) in which he admits that he found the

letter *outside* the trunk, and that the stamps and book found *inside* the trunk were not mentioned by him as he thought they had no bearing on the case.

This correspondence took place prior to *February* 17, yet in the letter of the Commissioner transmitting the record on appeal to Washington, dated *March* 3, the following is the report made therein by him on this subject, (*p.* 101-2-3):

> "Attention is invited to the fact that the attorneys of record failed to disclose the source of their information with regard to the conditions under which a certain bill or order was found *in the applicant's trunk,* despite direct inquiry from this office, so that the only inference is that secret communication was had with the applicant."

Note the ill grace with which the Commissioner fails to recognize the error. We submit that the facts of this disclosure relating to this letter and these wooden stamps, evidence in the mind of the officers, Inspectors and Commissioner alike, such a hostile attitude to the applicant that he was deprived of a fair hearing: that the attempt by Inspector Scully to falsify the record is clearly admitted, and that the point which appeared most deeply to distress the officers was the leak in the service, rather than that the rights, freedom and liberty of a human being had been jeopardized and that personal rights had been criminally infringed upon by unscruplous

and altogether dishonorable means. From their point of view, perhaps the integrity of their "system" is of vastly more importance than is the life and liberty of this poor friendless boy; but this view can prevail only temporarily at most: in the long run, a great, proud and arrogant "system" cannot afford to be unjust to the poorest and the meanest. Retribution will come, if not to the individuals of the "system," it will to the nation. The greater and stronger we are, the less we can afford to wrong unjustly a weak individual.

C. *The executive hearings fail to give any weight or consideration to the evidence and affidavit of Woo Mun,* (*p.* 86). We respectfully submit that this testimony, by reason of the peculiar conditions under which it was secured and taken, is the most important in the case: Yet it was given no weight whatever, and was reported on by Inspector Scully (*p.* 94) as adding nothing to the case. After submission the case was re-opened to hear the testimony of Woo Mun who had returned from China, since the arrival of Woo Dan.

There could be no possible chance of any coaching, as Woo Mun was still in China when Woo Dan left, and did not arrive here until nearly a month after the arrival of Woo Dan. Unless it could be shown that he had had an opportunity of consulting with Woo Dan, it must be apparent that his testimony to the relationship and home of Woo Dan if

corroborated by Woo Dan would be final and convincing. Woo Dan arrived on December 6, 1915, and Woo Mun on December 27, 1915. (*p.* 86). The examination of Woo Dan taken prior thereto shows that he knew of no other possible witnesses he could call, as he knew of none here that knew of his home village or himself other than Woo Wai Gim. The Inspectors knowing of the arrival of Woo Mun, carefully laid the groundwork to catch the applicant in a contradiction before he knew of the arrival of Woo Mun by taking his testimony on January 20, (*p.* 61), in which he is asked whether he knew any one else now in the United States, and whether any one else beside Woo Wai Gim had visited him in China who were now in the United States, to which he answered "no." He was thereupon warned "I want you to be very careful about these statements so that you will not at any time in the future claim that you forgot about these matters," and he was then asked "If any others should be presented as having called at your house at any time in China, you would not remember of such incident, would you?"

Then in a subsequent examination they sprung the fact that Woo Mun was in the United States, and Inspector Scully has it appear in the record that Woo Mun arrived in this Country and was confined in the detention sheds along with Woo Dan for a period of 22 days, bringing in the possibility and probability that they had been in repeated consultations with each other. Woo Mun was then produced

for taking of his testimony on behalf of the applicant. He of course testified that he had not talked with Woo Dan; and thereupon gave evidence of his recent visit to the home of Woo Dan, and of having seen the mother and grandmother and of his knowledge of the relationship between Woo Dan and Woo Hoo. (*See testimony Woo Mun p.6*). The detail of his testimony coincides closely with the testimony of Woo Dan. He described the family of Woo Hoo, and the mother and the wife, and of the village characteristics. The fact that his evidence should correspond with the evidence of Woo Hoo might not be so convincing of its entire truth, as the two had been together since arrival, but the fact of his visit being testified to by Woo Dan, and that it was timed the same by both; that the same circumstances are detailed the same by both, that the various facts testified to by one are corroborated closely by the other, leaves but one possible construction to be placed upon the testimony, and that is that is it absolutely truthful and accurate.

But is this evidence, (convincing as it is) given its proper or any weight by the Inspector in his report? Not so. What does he do, but again, and for the second time in this case, he seeks to so falsify the record as to show or make it appear that Woo Dan for a period of 22 days had access to the said witness, and thereby to cast a suspicion over its authenticity. (*pp.* 79-82). However by fortunate chance, applicant's counsel discovered the drift of

Inspector Scully's course, and addressed a letter to the Commissioner demanding that the record be corrected so as to correspond to the facts, viz, that Woo Mun had arrived at the detention sheds on the afternoon of Dec. 27 and was released the next morning, remaining only overnight therein. (*p.* 106).

The correction was made by the Commissioner in a letter to the Com. General (*pgs.* 106-106*b*) in which the matter is referred to as an "error" of the Inspector, and adding that *"it is unfortunate that this error occurred in this particular instance, in view of the fact that this case was one specially mentioned by the Chinese Consul General in his complaint to the Chamber of Commerce."* Thus it will be seen that no word was added of the additional weight that the elimination of such an error gave to the testimony of Woo Mun; it was not considered that his evidence conclusively proved the entire case for Woo Dan. The honorable Commissioner was not concerned so much with doing justice to the applicant, or in ascertaining the exact truth, as he was concerned in sustaining the "system" of which he was the distinguished representative on this Coast. It was he says, unfortunate that this "error" occurred in this *"particular"* case, which was then under investigation by a committee from the Chamber of Commerce. Inspector Scully was excused for committing a mere error. Yet such error was the second serious one, of which he had been found guilty in this "particular" case. In both instances, odd as it

may appear, the error, if not discovered, would have nullified the two most important pieces of testimony that proved the right of Woo Dan to land. The first would have indicated strongly that he had a brother, by reason of a letter found within his trunk so addressed, and the second would have thrown a serious cloud upon the testimony of Woo Mun, which absolutely corroborated Woo Dan as to his relationship to Petitioner.

Numerous references are found in the record of friction existing between the Chinese Consul and the San Francisco Chamber of Commerce on one side, and the Immigration Bureau on the other. The record contains letters of protest from the Consul (*p.* 90) against the methods used in this Woo Dan case, and the filing of his protest with the Chamber of Commerce. Upon these a committee from the Chamber made a report sustaining the protest of the Consul and the matter was carried to Washington.

These circumstances placed poor Woo Dan in the storm center of the contention, and made him the innocent victim of whatever rancor might have been engendered by the unfortunate discussion. In the midst of such a discussion his right to land was passed upon, and it is hardly possible that his case could, under such circumstances, have received the dispassionate consideration to which it was entitled. It is difficult at this day to appreciate the bitterness that was engendered, but it is sufficient indication when it is known that as a result, the immigration

Bureau by representations through the Chinese Ambassador, secured the removal of the Consul General. It is only now, that the matter can be viewed dispassionately, in the light of all the testimony, and a decision reached that will be in accord with justice and the law. At the time the record was changed so as to eliminate the alleged "errors" made by Inspector Scully, the additional weight to which the evidence was thereafter entitled, was not given to it, and for that reason applicant was deprived of the fair and impartial consideration of his application to which it was entitled.

D. *Another aspect of the taking of the evidence that was very unfair to the applicant rests in the numerous and unnecessarily exhausting examinations to which the applicant was subjected.*

The objection rests in the character of the questions asked, and not alone in the length of the examinations. It appeared to be the desire of Inspectors Lorenzen and Scully to so tire and exhaust the applicant that he would find himself in a hopeless maze of contradictions. We refer particularly to the examination of December 20, 1915, in which a mass of testimony was demanded that was impossible of either contradiction or corroboration, involving information on the character, feet, age and family of each member of the village in which he lived. The Commissioner appears to admit in his letter to the Commissioner General transmitting the record on appeal, (*p.*101-3),

that this criticism is well taken, when he says: "Considerable attention has been drawn to this case by attacks on the investigating officers by the attorneys of record and the Chinese Consul General, as will be noted from the letters appended to the record; but no extended comment is necessary as the record speaks for itself. This office however desires to express the opinion that the attacks are unwarranted, and that with the *possible exception of a few questions propounded by Inspector Scully, the materiality of which might not be apparent,* there is absolutely no ground which would furnish a basis for the charge that those officers were unfair or prejudiced in the conduct of this case."

In order to arrive at the true indication of this action by the Inspectors, it must be taken not alone, but in conjunction with the balance of the conduct of the case by these two inspectors. If an examination were being conducted by a prosecuting attorney before a court of law, in which the defendant was represented and protected, the trend of the examination could not be so objectionable; but in a case in which the inquisitors are also acting as jury, in which the applicant is not represented, and the examination held in secret, the burden rests heavily on the officials to show the fairness of the proceeding. They must be controlled by the theory that the inspectors are engaged in a fair search for the truth, not in an endeavor to *prevent* the landing of the applicant, but solely to determine whether he is en-

titled under the law to land.

> "The refusal to permit an alien representation by counsel, places upon the Immigration Officers the burden of showing the fairness of the proceeding. There must be an honest effort to establish the truth."
>
> "The essential thing is that there shall have been an honest effort to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law."
>
> *Chin Loy You* (D. C.) 223 Fed. Rep. 833.

and Judge Dooling has recently ruled that where the examination of the applicant is held in a spirit that is hostile either to the law or to the applicant, that the hearing is unfair and without due process of law.

> *Ex parte Lee Dung Moo,* 230 Fed. 746.
>
> *Ex parte Tom Toy Tin,* 230 Fed. 747.

When the Inspectors betray a wanton desire to prevent the landing of applicant, by the introduction of methods calculated to cloud the issue or to defeat the ascertaining of the exact facts, they are conclusively failing to give the applicant that fair hearing to which he is under the law entitled. It is immaterial whether the method is the result of "error" or criminal design. The effect is the same: —the applicant has been deprived of a fair hearing, and the Court is his proper refuge.

F. The record contains a statement by the Bureau's Surgeon to the effect that in his opinion the applicant's age is within one year either way of 23, thus taking him beyond the age of minority.

In view of the foregoing discussion of the weight of the evidence of Woo Mun, from which it must appear that Woo Dan is unquestionably the son of Woo Hoo, the surgeon's opinion as to age is of little weight, inasmuch as the return of Woo Hoo to this country is conceded to have been in November, 1895. As Woo Dan was born after his departure from China, (p.[illegible]) he must perforce, if he be the son of Woo Hoo, be still under the age of majority, whatever might be any ones opinion thereon.

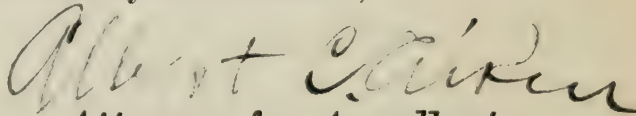
The Commissioner makes the point that applicant's minority is merely a "technical" minority inasmuch as he is married and as such ought not to be considered in his favor. However being married does not carry a boy out of the years of minority so as to evade the statutory definition of what constitutes minority. It is immaterial that a privilege be founded upon a right that is purely "technical," it is none the less a definite right. (*Ex parte Lee Dung Moo* 230 Fed. 746). Furthermore it appears positively that applicant has at all times been a member of his father's household and partly dependent therein, and that he intends to so continue here on landing. By custom in China, children marry as young as 15 years, and continue dependent members of the fathers household.

A final point suggested by Inspector Lorentzen, is that the photographs of applicant show a likeness, not to his alleged father Woo Hoo, but to the witness Woo Wai Gim, and that applicant in fact is one of the two sons of Woo Wai Gim, who was refused landing in 1910. As the photographs of these persons are before the Court a personal inspection is better than argument in this matter. The boy, Woo Sick Ngow, No. 5951, whose photograph was taken about April 1909 is the boy claimed by the Inspector to be the present applicant. We submit that there is a strong likeness between Petitioner Woo Hoo and his father Woo Dan, and that there is but a remote likeness to No. 5951 claimed by the Inspector. We note one very distinguishing feature between the family of Woo Hoo and the family of Woo Wai Gim, and that is the shape of the lobe of the ears. These seldom change, in course of years, and certainly in the course of five years they are not likely to change. We refer to the square cut of the lower portion of the lobe of the ear of both Woo Hoo and Woo Dan, and the large size of the lobe. The ears of Woo Wai Gim and his sons have very little lobe, and what is there, has an angular sharp slant. There are other points that will be apparent to the Court, such as the shape and slant of the eye, and the set of the lips and shape of the mouth which we need not now refer to further.

In conclusion we therefore submit that the hearing allowed to Woo Dan was unfair inasmuch as

from the above facts referred to, there was unquestionably in the minds of Inspectors and Commissioner alike a hostile attitude, that was evidenced by the efforts to falsify the record, by the methods resorted to to deceive the applicant into assuming a false position and into giving false testimony; and that this attitude of hostility was fostered, if indeed it did not have its start, in the bitterness engendered through the criticisms aimed at the Immigration Bureau by both the Chinese Consul and the San Francisco Chamber of Commerce; criticisms that were rendered the more bitter in that they were well taken, in some instances at least. This condition put the Department "on edge" to sustain its position and actions, and we contend that in the maelstrom of unhappy contention, Woo Dan became the unfortunate victim of circumstances. As a result, he has suffered an actual imprisonment in the detention sheds for more than a year. This is second only to a term in states prison for a dire offence; and yet he is guilty of nothing more serious than to have lawfully sought to join his old father in this happy land of ours. We very respectfully ask that the order of the lower Court be reversed, and that the applicant be landed upon the record now before this Court.

Respectfully submitted.,



Attorney for Appellant.

No. 2871

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WOO HOO, on Behalf of WOO DAN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellee.

Filed
MAR 14 1917
F. D. Monckton,
Clerk

Filed this.....day of March, 1917.

FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.

No. 2871.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WOO HOO, on Behalf of WOO DAN,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration at the Port of San Francisco,

Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE.

The appellant, Woo Dan, arrived at the Port of San Francisco on the Steamship "Chiyo Maru" on December 6, 1915, and applied for admission to the United States as the minor son of a domiciled merchant. After due consideration was given to the evidence introduced by appellant, he was ordered excluded by the Secretary of Labor for the reason that said appellant failed to establish his alleged relationship. A petition for a writ of habeas corpus was filed on behalf of appellant and the Government interposed a demurrer to said petition stating, first: that the said petition does not state

facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereunder, and second: that the said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of said appellant are conclusions of law and not statements of the ultimate facts. Upon the hearing of said demurrer said demurrer was sustained and the petition for a writ of habeas corpus denied.

ARGUMENT.

With reference to the first point dwelt upon by counsel for appellant, the Government desires to call attention to the fact that in this, as in all of the other Immigration cases, at the time of the argument of the demurrer to the petition for a writ of habeas corpus, the original record of the Bureau of Immigration is filed by the Government and made a part of the petition for a writ of habeas corpus and is considered part of said petition upon the hearing of the demurrer. This was done in the present case and it will be noted on page 4, paragraph number 2 of counsel's brief this fact is admitted. The lower Court then, in ruling upon the Government's demurrer, not only took into consideration the bare petition filed by appellant, but also considered the original record of the Bureau of Immigration, which is on file herein and marked respondent's "Exhibit B". This disposes of the first point made by counsel for appellant, namely:

that in as much as the bare statements in his petition are sufficient to justify the issuing of a writ of habeas corpus, the lower Court erred in sustaining the Government's demurrer, but leaving this point temporarily, the Government desires to call attention to the fact that even though the original record of immigration had not been attached to the petition for a writ of habeas corpus, the lower Court would have been entirely justified in sustaining the Government's demurrer to said petition, for without the evidence and other proceedings which were contianed in said original record of the Bureau of Immigration, said petition would not have stated sufficient facts to have justified the issuing of a writ.

There is but one other question to be determined in this case and that is whether or not the proceedings of the Bureau of Immigration and the Secretary of Labor were manifestly unfair, or were such as to prevent a fair investigation, or whether said proceedings taken amounted to a manifest abuse of discretion.

Low Wah Suey vs. *Backus,* 225 U. S. 460,

U. S. vs. *Ju Toy,* 198 U. S. 253; 49 L. Ed. 1040,

Chin You vs. *U. S.* 208 U. S. 852,

Tang Tun vs. *Edsell,* 223 U. S. 673,

and in order to determine this question, it is necessary to make an investigation of the evidence which

was considered by the Immigration officials in arriving at the conclusion that said appellant failed to show the relationship claimed by him.

The Government calls attention to the report of the medical examiner found on page 44 of the original record of the Bureau of Immigration on file herein and marked "Exhibit B", which reads as follows:

"December 21, 1915.

MEMORANDUM FOR THE COMMISSIONER.

In the case of Woo Dan, 1481/9-20, ex SS "Chiyo Maru", 12/6/15, in which you request an expression of opinion as to his probable age, I beg to state that after an examination and a careful consideration of the physical characteristics presented by the alien, I am of the opinion that his age is within one year either way of 23 years.

Respectfully,

(Signed) W. C. BILLINGS,
Surgeon, U. S. P. H. S.

(Signed) J. P. HICKEY,
A. A. Surgeon, U. S. P. H. S."

See also report of Inspector Lorenzen on page 63 of said record, which reads as follows:

"Jan. 20, 1916.

MEMORANDUM FOR THE COMMISSIONER.

In re WOO DAN, son of merchant, ex ss "Chiyo Maru" December 6, 1915.

A review of this case reveals the following affecting the relationship feature:

The alleged father has not been to China since about October 1895, and as applicant is claimed to have been born March 11, 1896, the former has never seen the latter, and can therefore not from personal knowledge identify applicant as his son. The testimony relative to the alleged visit of the identifying witness at applicant's home in 1909 does not have a genuine ring, and said witness also appears to be discredited by reason of his connection, as alleged father, with two applicants for admission, Woo Sick Ngow, No. 5951, and Woo Sick Pon, No. 253, ex ss "Korea" May 27, 1910, who were denied and deported. These conditions leave the case without any competent evidence to establish applicant's identity as the son of alleged father.

Not only has applicant failed to produce sufficient evidence to identify himself as the son of alleged father, but there are strong indications that such relationship does not exist. It does not seem reasonable that a Chinese would permit twenty years to pass without taking a trip to China to see his first born and only

son, whom he had never seen, yet that is the condition we are asked to believe in this instance.

There are also indications that this applicant is not a minor. The examining inspector believes him to be one of the two boys who applied for and were denied admission as the sons of the present identifying witness in 1910, and I must say that there is quite a general resemblance between them. Said boy, Woo Sick Ngon, would now be about twenty-two or twenty-three years of age, and that agrees with the estimated age given by the medical examiner of aliens for the present applicant. Applicant also claims to be married and be the father of a boy, by reason of which he has established a household of his own, and could not well claim to be a dependent member of alleged father's household.

In view of the foregoing applicant has not established that he is the dependent minor son of alleged father, and I accordingly concur in the recommendation of denial by the examining inspector.

(Signed) LAURITZ LORENZEN,
Immigrant Inspector."

Also a memorandum for the use of the Secretary of Labor found on page 116 of said record, which reads as follows:

"April 1, 1916.

In re WOO DAN, aged 20.

MEMORANDUM FOR THE SECRETARY.

1. Reason claimed as ground of admission: That the applicant is the minor son of a domiciled merchant.

2. Reason for exclusion at the port: That he has failed to establish the alleged relationship.

3. Issue:

 Relationship.

4. Substance of record in support of admission:

 Conceded mercantile status of the alleged father and verification of the visit he took to China which would permit of his parentage of the applicant.

5. Substance of record opposed to admission: Minor discrepancies in the record; age of applicant; and fact he is married.

The applicant, Woo Dan, is applying for admission at San Francisco as the alleged minor son of Woo Ho, an alleged merchant of the firm of Gung On & Co., 863 Clay St., San Francisco. The lawful residence and mercantile status of the father are conceded and his visit to China at a time which would permit of his paternity to applicant, who is claimed to be 20 years of age, has been verified. The applicant was re-

jected by the Commissioner at San Francisco apparently for the reasons set forth in the reports of Inspector Scully (49-50), and Inspector Lorenzen (62-63).

Inspector Scully points out that the alleged father testified (13) that there was only one ancestral hall, located in the 4th row, in the Wo Hing village, while the applicant testified (30) that there are two ancestral halls and that the one mentioned by the alleged father is in the second row; that the identifying witness, Woo Wee Gin, testified (9) that he visited the applicant's home in the Wo Hing village, that applicant's home was located in the 2nd row, 4th house, while the applicant testified (27) that he lives in the 3rd row, 4th house, and that he saw the witness at that location; that the alleged father testified (12) that he owned no other property in the village besides the two houses mentioned, while the applicant testified (28) that his father was also the owner of a piece of land in front of the village used for vegetable raising; that notwithstanding the fact that the applicant testified he never had a brother, there was found in his trunk a Chinese letter or bill (translation of which appears on page 45) written by someone in Vancouver and addressed to a brother, Woo Dock Wo; that a strong family resemblance was noted between the identifying witness and applicant and a photograph of an alleged son of the former, who was rejected at San Francisco in May, 1910 (exhibit "A"); and that the medical examiner of aliens had furnished a certificate to the effect that the age of applicant was within one year either way of 23.

Inspector Lorenzen (63) refers to the fact that the alleged father has never before seen the applicant, the latter having been born several months after he (alleged father) returned to this country; that the identifying witness was discredited in that he had previously appeared before that office as the alleged father in the case of two Chinese boys who were denied admission and deported and other cases (see exhibits) notwithstanding the fact that he testified he had never before been a witness; that the medical examiner had estimated applicant's age as being within one year, either way, of 23; that there was a strong resemblance between the applicant and the photograph of Woo Sick Ngow, the alleged son of the identifying witness (referred to by Inspector Scully), deported in 1910, who at this time would be about 22 or 23 years of age; and that the applicant was married and the father of an infant son.

On appeal as additional witness named Woo Mun has been introduced. His statement (84-86) is to the effect that he visited applicant's home in China in the fifth month, last year, where he saw applicant, the said visit having been made at the suggestion of the alleged father with whom he was acquainted in this country. This witness returned from China on December 27th and was permitted to land the following day, but claims that during the short period he was at Angel Island he did not see applicant. He is corroborated in this respect by the applicant and there is no reason to disbelieve their statements.

Aside from the discrepancies above outlined and the lack of identification, the Bureau recommends a dismissal of the appeal upon the following ground, to-wit:

Applicant is admittedly 20 years of age at the present time (according to American reckoning) his testimony and that of his alleged father being to the effect that he was born K. S. 22-1-18 (March 11, 1896), or five (5) months after the departure of the alleged father for the United States. The medical examiner at San Francisco expresses the opinion that applicant is within one year, either way, or 23 years of age, and the Bureau feels that this is particularly significant for the reason that if applicant is five (5) months older than the age he claims, it would preclude the alleged father, by reason of his return to the United States in October, 1896, from being the father of the applicant. On the other hand, conceding that applicant is the age claimed, he is at most only technically a minor, having for all intents and purposes attained his manhood; married and the father of a child. Certainly a case of this character cannot be held to come within the decision of the Supreme Court in the Mrs. Gue Lim case. In the latter case the child was under 15 years of age, admittedly dependent upon and entitled to the care and protection of the parents.

Several attacks have been made upon the investigating officers and the manner in which this case was handled by the San Francisco office, by the attorneys appearing in behalf of the applicant and the local Chinese Consul. Un-

fortunately the contentions of the attorneys were correct by reason of certain technical mistakes or oversights on the part of the examining inspector wherein reference was made to the fact that a certain Chinese letter was taken from inside the trunk of applicant while as a matter of fact it was found under the covering of the trunk; and reference to the length of time the additional witness, Woo Mun was detained at the station. The Inspector was under the impression that he arrived December 6th and was detained until December 28th, while the records show he arrived December 27th, and was released the following day.

The criticisms of the Chinese Consul-General, however, are in the Bureau's opinion, unwarranted and uncalled for, for the reason that an inspection of the record does not bear out his statements to the effect that the examining officers were endeavoring by means of trickery or other unfair methods to lay a basis for the exclusion of the applicant, but on the contrary shows that the entire investigation was conducted fairly and that the officers were only endeavoring to get at the truth.

It is recommended that the appeal be *dismissed.*

Assistant Commissioner-General."

See also the decision of the Secretary of Labor commencing on page 117 of said original record of the Bureau of Immigration but which ends on page 113 of the same record, as follows:

"May 6, 1916.

In re WOO DAN.

MEMORANDUM FOR THE SECRETARY:

This case was carefully reviewed by the Bureau in a memorandum dated April 1st, attached immediately hereunder. Since the preparation of that memorandum the record has been thrown open in its entirety to the attorney representing the applicant before the Bureau, the attorney has submitted a detailed brief, and has also been accorded an opportunity to argue the case orally. On the basis of the brief and argument the record has been re-examined and all of the contentions advanced in behalf of the applicant carefully considered.

The Bureau does not find itself, however, able to reach any other conclusion than that this applicant should be deported. There is considerable doubt that he is a minor; he is more likely 22 to 24 years of age than 20 as claimed. At any rate he is in no substantial sense the minor son of a merchant, even if it should be conceded (as it is not) that the evidence is sufficient to show affirmatively that his claim of relationship to the alleged father is true. It is not claimed with respect to him that he is less than 20 and he is married and the responsible head of a family; so that his landing could be justified, even if the evidence of relationship were clear and satisfactory, only by observing form and ignoring substance upon this proposition of

minor children joining their parents here and by arbitrarily fixing upon the American age of majority as the age which is to be the dividing line in such a Chinese case.

The case has excited considerable comment and some criticism. It is one of those included in a list recently submitted by a representative of the San Francisco Chamber of Commerce. The Chinese Consul General at San Francisco has also made it the basis of severe strictures upon the examining officers and of criticism of the manner in which this Bureau conducts its official duties. These things are mentioned, not because they influence the Bureau in one way or another, but simply as interesting facts that are worthy of notice, if not of detailed comment. The case must of course be decided upon the record without regard to what some one who has a second or third-hand interest or knowledge in the matter may think of it.

It is encumbent upon every Chinese who attempts to enter this country to establish his claim of right to enter. Looking at the case simply upon the basis of this question 'Has the applicant affirmatively proven that he is the minor son of a domiciled merchant?' the Bureau is obliged to reach the conclusion that he has not. In other words, looking at the case in a reasonable and logical way and permitting each item of the evidence to produce its natural effect upon the mind, the Bureau does not find itself satisfied that the applicant is the minor son of a merchant. It must there-

fore, in pursuance of the requirement of the law to that effect, recommend that the decision of the Commissioner at San Francisco be AFFIRMED.

(Signed) A. CAMINETTI,
Commissioner-General."

It will be noted that the memorandum to which the Court's attention has been directed contains refences to pages. These references refer to pages of the original record of the Bureau of Immigration, and an examination of them will show that on the pages referred to, the testimony will support the said memorandum. A careful investigation of said record shows conclusively that the appellant in this case was shown every consideration by the Immigration officials and counsel fails to point out a single instance in his brief where unfairness was shown on the part of the Immigration officials. In fact, the cases to which attention has been directed in counsel's brief do not set forth anything new.

In *ex parte Lee Dung Moo,* 230 Fed. 746-747 and *ex parte Tom Toy Tin,* 230 Fed. 747, the question involved in both of these cases was with reference to the entrance into the United States of a citizen: in other words, a Chinese, born in China, with parents in the United States who are citizens of the United States. The question determined in both of those cases was to the effect that the Immigration officials had no right to go beyond the Acts of

Congress and if the fact were established that the father of the applicant was a citizen, the applicant had a right to enter the United States, even though he were upwards of the age of twenty-one. This, no doubt is the law, but in the present case the question is entirely a different one. Here the Immigration officials were determining whether or not the relationship of father and son existed between the appellant and appellant's alleged father, and furthermore, whether or not said appellant was the *minor son* of his alleged father, who was a merchant and doing business in the United States.

From the very nature of the investigation, the hearings conducted by the Immigration officials must be of a summary character.

Chin Yow vs. *U. S.* 208 U. S. 8,

Sibray vs. *U. S.,* 227 Fed. 1,

and not subject to the formalities of procedure and rules governing the admissibility of evidence.

Ex parte Garcia, 205 Fed. 53,

Fong Yue Tung vs. *U. S.,* 149 U. S. 698,

U. S. vs. *Hong Chang,* 134 Fed. 19,

Jew Yuen Case, 188 Fed. 350,

Choy Gum vs. *Backus,* 223 Fed. 487,

Siniscalchi vs. *Thomas,* 195 Fed. 701,

Jeung Bow vs. *U. S.,* 228 Fed. 868,

and the findings of the Secretary of Labor are final and conclusive.

Ekiu vs. *U. S.,* 142 U. S. 651,

Lee Lung vs. *Patterson,* 186 U. S. 170,

The Japanese Immigrant case, 189 U. S., page 86,

Tang Tun vs. *Edsell,* 223 U. S. 673,

Low Wah Suey vs. *Backus,* 225 U. S. 460,

U. S. vs. *Ju Toy,* 198 U. S. 253,

Zakonaite vs. *Wolf,* 226 U. S. 272,

Chin You vs. *U. S.,* 208 U. S. 8,

Healy vs. *Backus,* 221 Fed. 358.

In *Lee Lung* vs. *Patterson,* supra, the Court said:

> "It was decided in the Nishimura Ekiu's case that Congress might intrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend, and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to reexamine the evidence on which he acted or to controvert its sufficiency. This doctrine was affirmed in *Lem Moon Sing* vs. *U. S.,* 158 U. S. 538, 39 L. Ed. 1082; 15 Sup. Ct. Rep. 967 and at the present term in *Fok Young Yo* vs. *U. S.,* 185 U. S. 306."

In *Low Wah Suey* vs. *Backus,* the Court said:

> "A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair; that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases the order of the executive officers within the authority of the statute is final. *U. S.* vs. *Ju Toy,* 198 U. S. 253; *Chin Yow* vs. *U. S.,* 208 U. S. 8, *Tang Tun* vs. *Edsell,* 223 U. S. 673."

The Court will not inquire into the sufficiency of the probative facts or consider the reasons for the conclusions reached by the Immigration officials.

Healy vs. *Backus,* 221 Fed. 358, 365,

White vs. *Gregory,* 213 Fed. 768,

Lee Lung vs. *Patterson,* 186 U. S. 170.

In conclusion the Government desires to call attention to the fact that every act on the part of the Immigration officials, as shown by the said original record of the Bureau of Immigration on file herein, shows that every consideration was given to said appellant, and for this reason their action

should be upheld by this Court and the judgment of the lower Court sustained.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUM,
Asst. U. S. Attorney.

Attorneys for Appellee.

No. 2872

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHARLES A. SULZER, J. M. TANNER, J. R. HECKMAN, ARTHUR G. SHOUP, WILLIAM E. BRITT and JOHN B. HEID,

Appellants,

vs.

WALSTEIN G. SMITH, as Treasurer of and for the Territory of Alaska,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed
DEC 22 1916
F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2872

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

JOHN G. HEID, of Juneau, Alaska, and Z. R. CHENEY, of Juneau, Alaska,
Attorneys for Appellants.

JOHN H. COBB, of Juneau, Alaska,
Attorney for Appellee.

In the District Court for the Territory of Alaska, at Juneau, Division No. 1.

No. 1323–A.

CHARLES A. SULZER, J. M. TANNER, JOHN R. HECKMAN, ARTHUR G. SHOUP, WILLIAM E. BRITT and JOHN G. HEID, for Themselves and as Representatives of and for the People of Judicial Division No. 1, Southeastern Alaska,

Plaintiffs,

vs.

WALSTEIN G. SMITH, as Treasurer of and for the Territory of Alaska,

Defendant.

Bill of Complaint.

To the Judge of the District Court of and for the Territory of Alaska, in Division No. 1:

1.

Charles A. Sulzer, J. M. Tanner, John R. Heckman, Arthur G. Shoup, William E. Britt and John G. Heid, all citizens of the United States and of the Territory of Alaska, and representatives of and for

all the people residing in said Division No. 1 of the Territory of Alaska, bring this suit against Walstein G. Smith, as treasurer of and for the said Territory of Alaska, and thereupon your complainants say:

2.

That said Charles A. Sulzer, of Sulzer, Alaska, and said J. M. Tanner, of Skagway, Alaska, each, now are the duly elected, acting and qualified senators of and for said Division No. 1 of said Territory of Alaska, and representing and did represent the people of the said Division No. 1, in the Senate of the Legislature of the said Territory of Alaska, at its second session held in the spring of the year 1915.

3.

That said John R. Heckman, of Ketchikan, Alaska, and Arthur G. Shoup, of Sitka, Alaska, William E. Britt, of Juneau, Alaska, and John G. Heid, of said Juneau, Alaska, are all citizens of the United States of America, and citizens and residents of said Division No. 1, Alaska, and representatives [1*] of and for all the people of said Judicial Division No. 1, Territory of Alaska, and did represent the people of said Division No. 1 in the House of Representatives of the Legislature of said Territory at and during its second session, in the spring of the year 1915.

4.

That the said above-named complainants bring this suit on behalf of and for the benefit of themselves and said citizens and residents of said Judicial Division No. 1, Alaska; the matter involved, and to be

*Page-number appearing at foot of page of original certified Transcript of Record.

determined herein, being of a common interest of and to all said citizens and residents, and it is impracticable to bring them all before this Court.

5.

That the said Territory of Alaska is divided into four Judicial Divisions, viz.: Division No. 1, embracing southeastern Alaska; Division No. 2, embracing northern Alaska; Division No. 3, embracing western and southwestern Alaska; and Division No. 4, embracing eastern or interior Alaska.

The said Division No. 1, of Alaska, containing, approximately, an area of forty-nine thousand (49,000) square miles; the said Division No. 2 containing, approximately, an area of one hundred fifty-eight thousand six hundred (158,600) square miles; the said Division No. 3 containing an approximate area of one hundred and sixty-two thousand (162,-000) square miles; and said Division No. 4 containing an approximate area of two hundred twenty-eight thousand and six hundred (228,600) square miles.

6.

That in the month of August, 1902, by proclamation of the President of the United States of America, duly made, the Alaska Tongass National Forest Reservation was created, and which said Tongass National Forest Reservation was, in the month of February, 1909, by proclamation duly made by the President of the said United States extended to its present limits, which limits embrace the greater part of said Division No. 1, and is wholly situated and lying therein.

7.

That by the Act of the Congress of the said United States, approved **[2]** May 23, 1908, it was and is provided as follows:

> "That hereafter twenty-five per centum of all money received from each Forest Reserve during any fiscal year, including the year ending June 30, 1908, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which said reserve is situated, to be expended as the State or Territorial Legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the Forest Reserve is situated; Provided, That when any Forest Reserve is in more than one State or Territory or county the distributive share to each from the proceeds of said reserve shall be proportional to its area therein."

8.

That of and from all the money derived and received by the United States of America from the sale of timber, uses, etc., of the said Tongass National Forest Reserve, all situated within and in said First Judicial Division of Alaska, as aforesaid, twenty-five per centum thereof was paid by the Secretary of the Treasury of the said United States to said defendant, Walstein G. Smith, as treasurer of the said Territory of Alaska, and amounting to the full sum of $52,968.17 for the purposes aforesaid, to wit, for the benefit of the public schools and public roads of said Division No. 1, to be expended in said Divi-

sion No. 1 as the Territorial Legislature of Alaska may prescribe.

9.

That the said Alaska Territorial Legislature, in the year 1915, at its second session thereof, by and through a majority of its members hailing from localities outside of and without said First Judicial Division, to wit, said second, third and fourth judicial divisions, in the month of April, 1915, passed an Act, being House Bill No. 14, entitled "An Act creating four districts in the Territory of Alaska, and creating the office of road commissioners for each road district and appropriating moneys derived from that certain fund in the treasury of the Territory of Alaska, known as the 'Forest Reserve Fund,' for the purpose of building, repairing and maintaining of trails, roads and bridges in the Territory of Alaska, and declaring an emergency therefor."

10.

That the said above-mentioned legislative Act was approved by the Governor of Alaska on April 28, 1915; the said Territorial Legislature [3] by said Act attempting to divide the Territory of Alaska into four road districts, each being one of the judicial divisions aforementioned, to be and constitute a road district, and attempting to divide all of the money received by the Treasurer of the Territory of Alaska from the Secretary of the Treasury of the United States under said Act of Congress, approved May 23, 1908, as follows: twenty-five per centum (25%) for the use and benefit of public schools in Alaska, and seventy-five (75%) per cen-

tum to be divided equally between said four judicial divisions or road district, thereby giving and apportioning to each of said four road districts a one-fourth part or share of said forestry money or fund, irrespective of the fact whether any part of said whole fund had been paid on account of a Forest Reserve being situate in such divisions or districts, contrary to the provisions and intent of said Act of Congress, approved May 23, 1908, and to the irreparable damage and injury of said Division No. 1 of Alaska, represented by these plaintiffs and complainants, in that, if the wrongful and unconstitutional provisions of said Alaska Territorial Act, passed and approved as aforesaid on April 28, 1915, making such division of said school and road fund, as aforesaid, are carried out and performed by said defendant, as such Treasurer of the Territory of Alaska, said school and road fund so created, as aforesaid, will be divided into four parts as directed by said wrongful and unconstitutional Act of said legislature, three-fourths part of said full sum, to wit, the sum of thirty-nine thousand seven hundred twenty-six and 12/100 dollars, will be entirely lost to said Division No. 1 of Alaska and said Division No. 1 of Alaska, its residents, citizens, as well as school children therein, (of which there are many), will be deprived of the use and of the whole of the same for such said school and road purposes, without redress or possible recovery of the said money or fund, belonging to said Division No. 1 of Alaska, to the great and irreparable injury and damage of

the said school children and residents, inhabitants and citizens of said Division No. 1 of Alaska. [4]

11.

That the said forestry, school road fund, aforementioned, and amounting, so far, to the sum of $52,-968.17, has been paid into the treasury of the Territory of Alaska by the Secretary of the Treasury of the United States, and is now in the hands and custody, and under the full control, of the said defendant, Walstein G. Smith, as Treasurer of said Territory of Alaska, subject to the disposal under the provisions of said Act of the Legislature of Alaska, and unless restrained and prohibited by an order of this Court, the said defendant, as such treasurer, will pay out of the treasury of said Territory of Alaska, the sum of thirty-nine thousand seven hundred twenty-six and 12/100 dollars ($39,726.12), belonging to said Division No. 1, being a three-fourths part of the whole of said fund, to said road districts, numbered 2, 3 and 4 of said Territory of Alaska, to the great and irreparable injury and damage of and to said Division No. 1, and for which said Division No. 1, its citizens, residents, inhabitants and school children, have no plain, speedy, complete or adequate remedy at law.

12.

That the said Act of the said Alaska Territorial Legislature, approved April 28, 1915, as aforesaid, is void for uncertainty and is unconstitutional for the following reasons:

a. The said Act does not provide for a common road system in Alaska, and makes no specific appro-

priation for the construction of any specific road within any one of the road districts or divisions mentioned, and does not prescribe any specific sum of money to be expended in the construction of any particular road, nor how and where, in any one of said road districts or divisions said school or road fund shall be expended.

b. The said Act does not define the duties of the several road commissioners, attempted to be created by said act.

c. The said Act does not provide to whom the said road commissioners shall give the bond specified in said Act. [5]

d. The said Act is in conflict with said Act of Congress, approved May 23, 1908, and therefore is void and of no effect.

e. The said Act is in conflict with, and unauthorized by section 3 of the "Organic Act" passed by the Congress of the United States of America, approved August 24, 1912, entitled "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," in that, the said section 3 does not extend the authority of the legislative assembly, created by said Act, to alter, amend, modify and repeal the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes."

13.

That of the said forestry fund, the said sum of

$52,968.17 was paid, as aforesaid, to said defendant, Walstein G. Smith, as treasurer of and for the Territory of Alaska, and was so paid to said defendant, as such treasurer, on account of and derived from sales of timber, uses, etc., of said Tongass National Forest Reserve, all of which said Tongass National Forest Reserve being situated in and within the limits and boundaries of said Judicial Division No. 1 of Alaska. That said Judicial Division No. 1 is a civil division of the Territory of Alaska for political and judicial purposes, and said Division No. 1 is entitled to have and use all of said above-mentioned sum of $52,968.17.

PRAYER.

WHEREFORE, complainants humbly pray that this Honorable Court may make and enter its order and decree, adjudging and decreeing that said Division No. 1 of Alaska, its citizens, residents, and inhabitants to be entitled to, and have the use of, all of said sum of $52,968.17; derived from the sales of timber, uses, etc., of the said Tongass National Forest Reserve, situated and being all in said Division No. 1 of Alaska, for school and public road purposes as provided by said [6] Act of Congress approved May 23, 1908;

That this Honorable Court may make and enter its further order and decree, perpetually enjoining the defendant, as such treasurer, his agents or employees, from paying out any part of said Forestry Reserve Fund, in his possession or under his control, to anyone, save and except to said Division No. 1 of Alaska, its agents, servants or officers en-

titled to receive the same for or on account of said Division No. 1;

That the defendant be enjoined and restrained by an order of this Court from committing any of said acts, herein complained of, pending this suit.

That complainants may have such other and further relief as may to the Court seem equitable and just in the premises.

JOHN G. HEID,
Attorney for Complainants.

United States of America,
District of Alaska,
Division No. 1,—ss.

John G. Heid, being first duly sworn, says: I am one of the complainants named in the foregoing and within complaint, that I have read the said complaint and know the contents thereof, that the same is true as I verily believe.

JOHN G. HEID.

Subscribed and sworn to before me this 1st day of July, 1915.

[Notarial Seal] GUY McNAUGHTON,
Notary Public for Alaska.

My commission expires Oct. 24th, 1916.

Filed in the District Court, District of Alaska, First Division. Jul. 1, 1915. J. W. Bell, Clerk. By ————, Deputy.

[Endorsed]: No. ——A. In the District Court for Alaska at Juneau, Division No. 1. Charles A. Sulzer, John R. Heckman et al., for Themselves and Residents of Division No. 1, vs. Walstein G. Smith,

as Treasurer of the Territory of Alaska. Bill of Complaint. John G. Heid, Attorney for Complainants. [7]

In the District Court for Alaska, Division Number One, at Juneau.

No. 1323–A.

CHAS. A. SULZER et als.,

Plaintiffs,

vs.

WALSTEIN G. SMITH, as Treasurer of the Territory of Alaska,

Defendant.

Demurrer.

Comes now Walstein G. Smith, as treasurer of the Territory of Alaska, by J. H. Cobb, chief counsel for the said Territory, and demurs to the complaint of the plaintiffs herein, and for grounds of demurrer alleges:

I.

The plaintiffs have no capacity to maintain this suit.

II.

The said complaint does not state facts sufficient to constitute a cause of suit, in this: (a) It appears from said complaint that the Act mentioned in paragraph 7 of said complaint is a general appropriation by Congress of certain funds of the Federal Government; that under said Act, the defendant received and holds the sum of $52,968.17; that said fund so received and held is to be expended under

terms of the grant, "as the Territorial Legislature may prescribe for the benefit of the public schools and public roads"; that the Act of the Alaska legislature mentioned in paragraph 9 of said complaint is a valid exercise of the power contained in said grant.

(b) It is not alleged that the forest reserve from which said moneys were derived is situated within the boundaries of any county, or that complainants reside in any county whereby they or it, are entitled to any exclusive benefit therefrom. [8]

(c) No facts are alleged showing that the complainants or the people of Judicial Division Number One are entitled to have said moneys expended in said division otherwise than prescribed by the Alaska Legislature.

(d) No sufficient facts are alleged to render said Act of the Alaska Legislature void for uncertainty.

(e) No facts are alleged showing why or in what respect said Act of the Alaska Legislature is in conflict with the Act of Congress of May 23, 1908.

(f) No facts are alleged, showing why or in what respect the said Act of the Alaska Legislature alters, amends, modifies or repeals the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools and the care and support of insane persons in the District of Alaska, and for other purposes."

(g) No facts are alleged showing why or under what grant or title Judicial Division Number One, is entitled to have and use all of said sum of $52,968.17.

III.

The Court has no jurisdiction of the cause of action, in that the complainants seek to have the Court by its decree modify and control a legislative appropriation of public moneys, and substitute such decree for the legislative Act.

Wherefore defendant prays judgment of the Court, whether he need answer further herein, and that the bill of complaint be finally dismissed with costs.

J. H. COBB,
Chief Counsel for the Territory of Alaska.

Service of the above and foregoing Demurrer admitted this the —— day of July, 1915.

JOHN G. HEID,
Attorney for Plaintiffs.

Filed in the District Court, District of Alaska, First Division. Jul. 6, 1915. J. W. Bell, Clerk. By ————, Deputy. **[9]**

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1323–A.

CHARLES A. SULZER et als.,
Plaintiffs,

vs.

WALSTEIN B. SMITH, as Treasurer of and for the Territory of Alaska,
Defendant.

Memorandum Opinion. [10]

The complaint in this suit alleges in substance:

1st. That the Tongass Forest Reserve is, and was at all times in the complaint mentioned, situated wholly within the First Division of Alaska. That from the sale of timber situated in such reserve there had accumulated a certain sum, twenty-five per centum of which is $52,968.17.

2d. That by the Act of Congress approved May 23, 1908, it was provided—

> "That hereafter twenty-five per centum of all money received from each Forest Reserve during any fiscal year, including the year ending June 30, 1908, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which such reserve is situated, to be expended as the State or Territorial Legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the Forest Reserve is situated."

3d. That in pursuance of said Act, the Secretary of the Treasury turned over to the defendant as Territorial Treasurer, the said sum of $52,968.17, and that the said treasurer now holds the said sum.

4th. That by an act approved April 28, 1915, the legislature of the Territory of Alaska "divided the Territory of Alaska into four road districts," each one of the judicial divisions of Alaska constituting one road district, and "attempted to divide all of

the money received by the treasurer" as follows: "25 per centum for the use and benefit of public schools in Alaska, and 75 per centum to be divided equally between the said four judicial divisions or road districts, thereby giving and apportioning to each of said four road districts a one-fourth part or share of said Forestry money or fund, irrespective of the fact whether any part of said whole fund had been paid on account of a Forest Reserve being situate in such divisions or districts, contrary to the provisions and intent of said Act of Congress, and to the irreparable damage and injury of said Division No. 1 of Alaska"; and that if the said provisions of said Act of the [11] Territorial Legislature are carried out "said school and road fund so created as aforesaid will be divided into four parts as directed by said wrongful and unconstitutional act of said legislature; three-fourths part of said full sum, to wit, the sum of $39,726.12 will be entirely lost to said Division No. 1 of Alaska, and said Division No. 1 of Alaska, its residents, citizens, as well as the school children therein (of which there are many), will be deprived of the use and of the whole of the same for such said school and road purposes, without redress or possible recovery of the said money or fund belonging to said Division No. 1 of Alaska, to the great and irreparable injury and damage of the said school children and residents, inhabitants and citizens of said Division No. 1 of Alaska."

5th. That plaintiffs are citizens and residents of the First Division of the Territory of Alaska, and

represented the said Division in the said Territorial Legislature.

The prayer is for an injunction restraining the treasurer from diverting any of this fund to the benefit of roads or schools in any divisions other than the First.

To this complaint a demurrer has been interposed on the following grounds:

1. Plaintiffs have no capacity to maintain this suit.

2. The complaint does not state facts sufficient to constitute a cause of suit.

In support of the demurrer it is urged that there are no counties in Alaska—or rather, that all Alaska must be taken as a county, and therefore that the disposal of the fund was entirely in the discretion of the legislature; in support of the complaint it is urged, that although there are no subdivisions in Alaska by the name of counties, yet the judicial divisions of Alaska are to all intents and purposes the same as counties, and that insomuch as the act of Congress aforesaid provides that the money shall be turned over to the Territorial Treasurer to [12] be expended as the legislature may prescribe "for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated," the legislature had no power to divert this fund to any other purpose than to that expressed in the act. It is said that for the legislature to appropriate for the benefit of roads and schools in the Territory at large that money which Congress evidently meant to be applied for local benefit is to

betray and flout the trust which Congress reposed in the legislature, and that the Court ought to interfere to prevent what is avowed to be a palpable diversion of public funds.

Of course there is no magic in the word county. If there are subdivisions of the Territory of Alaska possessing the substantial attributes of what are called counties, the name of the subdivisions would not be important.

The judicial divisions of Alaska are in a great measure analogous to counties—they are subdivisions of Alaska both for judicial and political purposes—judicial insomuch as each division has a judge, a Marshal and a district attorney—political insomuch as each division elects members to the legislature. It is true that the divisions have no fiscal entity, no county commissioners, no county government, no county institutions, and neither raise nor expend funds provided by local taxation, but, for all that, they are more nearly analogous to counties than anything else we have. It cannot be gainsaid successfully that Congress meant this money to be applied to the needs of roads and schools in that part of the state or territory where the forest reserve was situated. It seems, however, to the Court that whether or not the judicial divisions should be held to be counties (and the Court expresses no opinion on the subject), there are three very substantial reasons why this action cannot be maintained, to wit:

A. Even conceding that the divisions should be considered as counties, yet a county is only a quasi-corporation which exists [13] only for public pur-

poses connected with the administration of a state government, and its revenues are not the property of the county in the sense in which the revenue of a private person or corporation is regarded. "The whole state has an interest in the revenue of a county, and for the public good the legislature must have the power to direct its application. The power conferred upon a county to raise a revenue by taxation, for instance, is a political power and its application, when collected, must necessarily be within the control of the legislature for political purposes."

Marion County vs. Lear, 108 Ill. 343;

People vs. Powers, 27 Ill. 187;

State vs. Graham, 19 N. W. 470.

B. The trust expressed in the Act of Congress is a trust personal to the United States, and this suit is not brought by the United States.

When Congress directed this money to be turned over to the Territorial Treasurer to be expended in such way as the legislature of Alaska might prescribe for the benefit of roads and schools in the county where the forest reserve was situate, it created only a personal trust. The money derived from the sale of the forest lands belonged to the United States, and the United States had the power to give it to whomsoever it pleased, and to make any person or body, corporate or unincorporate, its agents to disburse the fund. The United States constituted the legislature of the Territory as its disbursing agent, investing it with a large amount of discretion—the Territorial Treasurer is but the safe in which the money is deposited. Congress said to the legislature,

"We grant this money to the Territory for the benefit of roads and schools in that part of the Territory which produced the money, and we trust you to so apply it." If the legislature does not so apply it, no one can complain but the donor, *i. e.,* the United States. [14]

In regard to the trust created by donation of the 16th and 36th sections of public lands for the support of schools, the Supreme Court of the United States says—

> "The trusts created by these compacts relate to a subject certainly of universal interest but of municipal concern over which the power of the state is plenary and exclusive. In the present instance the grant is to the state directly, without limitation of its power, though there is a sacred obligation imposed on the public faith." Cooper vs. Roberts, 18 Howard, 175–182.

In relation to swamp lands granted by the Government to certain states for the express purpose of reclamation; By the Act of Congress approved the 28th of September, 1850 (9 U. S. Statutes at Large, 519), the terms of the grant are—

> "To enable the state of * * * to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein";

and yet, in Dunklin County vs. the District Court of Dunklin County, 23 Mo. 449, the Supreme Court of Missouri hold that the trust created by the Act of Congress granting the swamp-lands to the state for the benefit of the county in which they were situated

was a personal trust reposed in the public faith of the state and not a property trust fastened upon the land.

In Barrett vs. Brooks, 2 Iowa, 144, the Supreme Court of the State of Iowa held: First, that under said Act of Congress the fee simple title to the swamp-land passed to the State, and the legislature might dispose of the same; second, that the United States is the only party which can enforce the trust coupled with said grant, to apply the funds arising from the sale of such lands "exclusively, as far as necessary, to the purposes of reclaiming the lands"; that it cannot be enforced on the application of a private citizen.

In this last case the supervisors of the county, under the authority of the law of the State, appropriated $7,000 of the swamp-land fund to aid in the building of bridges in the county. A citizen undertook to restrain such appropriation on the ground that it was a diversion of the fund from the purposes contemplated by the Act of Congress. Judge Dillon, who delivered the opinion of the Court, says: [15]

> "The United States is the donor. Admit that the State or the county holds the lands, charged with a trust to apply the proceeds, as far as necessary, to the reclamation of said lands, who can enforce this trust? The United States might. * * * The United States, in this grant, deals with a state and not with counties or individuals. If the United States is satisfied with the disposition which the state has made,

> or authorized to be made, of these lands, individual citizens must remain content."

The same doctrine is in substance held by the Supreme Court of the United States in Schulenberg vs. Harriman, 21 Wallace, 44.

In Supervisors v. State's Attorney, 31 Ill. 68, the Supreme Court of the State of Illinois hold that the grant of the swamp-lands to the States was absolute, although the grant provided that it was for the purpose of reclaiming the said swamp-lands; that the act did not even impose a trust upon the State to apply the proceeds of the said lands to their reclamation; that the State had the power and right to dispose of such proceeds for any purpose which the legislature should determine was for the interest of the State; and in the same case the Court holds that even if a trust was imposed by the Act of Congress, there was no way to enforce it unless the United States should interfere. The same doctrine was reiterated in Newell vs. Supervisors, 37 Ill. 253, 2 N. W. 312.

The Supreme Court of Oregon, speaking of the same act says:

> "The trust raised by the proviso is a matter of legislative, and not of judicial, concern; hence the diversion of the proceeds of the sale of swamp and overflowed lands from the purpose expressed in the Act of Congress to those of aiding in the construction of certain works of internal improvements, provided for by the legis-

lative assembly of the State of Oregon, in no way operates to defeat the title of the State."

"These authorities fully support the position that the legislature has full power to dispose of the proceeds of the sales of swamp-lands, at least as against everybody except the United States; and that no person or corporation can be permitted to avoid any responsibility which has been assumed under the laws of the State in regard to the proceeds of the sales of these lands on the ground that such proceeds are appropriated to a use which is not authorized by the grant of Congress, or which is in violation of the trust imposed upon the State by such act."

La Pointe v. Ashland, 2 N. W. (Wis.) 312.

I cannot see any substantial difference between the principles enunciated in those cases and those which are applicable here. So it would seem that even conceding that the First Division is a [16] fully equipped county, the power of the legislature to disregard the trust imposed cannot be questioned by anyone but the United States, or possibly by the Territory itself.

C. Plaintiffs show no equity in themselves for injunction. The Court is asked to hold this act of the legislature to be in violation of the Organic Act—*i. e.,* unconstitutional, and it is asked to do this at the suit of individuals who show no injury to themselves. That this cannot be done I do not think admits of a doubt.

Of course the State, by virtue of its prerogative sovereignty as the guardian of all the people, would

have a standing in a court of equity to enjoin the violation of a public trust; but even the State itself, when it acts for the protection of its own material interests and not by virtue of its prerogative sovereignty, cannot successfully invoke the aid of a court of equity for an injunction, unless it establishes a case of equitable cognizance, and a right to the peculiar relief demanded—in such a case its position would not be different from that of an ordinary suitor.

People vs. Canal Board of N. Y., 55 N. Y. 395.

In People vs. Ingersoll, 58 N. Y. 14, the Court says:

> "A distinction is to be observed between actions by the people of the State, in right of the prerogative incident to sovereignty, and those founded upon some pecuniary interest or proprietary right. The latter are governed by the ordinary rules of law by which rights are determined between individuals."

State vs. Pennoyer, 37 P. R. 906, was a case brought in the name of the State, not in its incidental sovereignty but *ex rel.* a citizen, and Judge Wolverton says:

> "The case at bar presents the peculiar situation of the State calling into requisition one coordinate branch of the government to enjoin the executive and ministerial officers of the State, acting in the capacity of a board of commissioners of public buildings, from carrying out the provisions of a law adopted by another coordinate branch of the same State government.

> The contention of the State is that the Court must interpose by the extraordinary remedy of injunction, and render nugatory the solemn enactment of a co-ordinate branch of its government, as in contravention of the fundamental law, without at the same time alleging any facts showing wherein and in what manner the State would be [**17**] damnified, and without exhibiting any good or sufficient reason for the exercise of such extraordinary power. A mere suggestion that the act complained of is unconstitutional, and that the legislature has exceeded its constitutional limitations, is insufficient to call into requisition a court of equity. 'The Court, as such, has no supervisory power or jurisdiction over public officials of public bodies.' The State, when equitable relief is sought, such as is prayed for in the present proceeding, must, like private individuals, bring itself within the known and fixed rules of equitable cognizance before the Court will grant its petition."

However, this is somewhat beside the question, for, in the case at bar no state, no sovereignty is here, either by virtue of its incidental prerogative, or by virtue of being a physical sufferer, or on the relation of some one; it is not here at all. This is a suit brought by private individuals, for the plaintiffs are but private individuals, although they say they are members of the legislature.

It is not here alleged that the plaintiffs' taxes will be increased (in fact it is not even alleged that they

are taxpayers), or that there will be any scarcity of funds for roads or schools; or that they, or any one of them, have any children going to school, or are interested in any way whatsoever. For this Court to declare an act of the legislature to be against Organic Act—that is, to be unconstitutional, at the suit of a person who shows no greater interest than plaintiffs in this case show themselves to possess, would be for the Court to exercise an unwarrantable and almost unheard of assumption of power.

So far as a suit by a citizen for an injunction is concerned, Judge Wolverton says:

> "It is the settled doctrine of this State that an individual taxpayer, whose burdens would be increased by the wrongful acts of public officers and where a fraudulent or illegal diversion or misapplication of the public funds is about to be consummated, has such an interest, by reason of the special and peculiar injury he would sustain, as would give him a standing in a court of equity by injunction to restrain such acts and prevent such diversion of the public funds. * * * The taxpayer, however, must present such a case as will bring him within the ordinary equitable rules which govern when relief by injunction is sought. He must show that some act is threatened or imminent which will result in some material injury to himself, for which there is no other adequate remedy at law. * * * It (injunctive relief) was never granted merely to prevent an officer from carrying out a law of the state which was deemed un-

constitutional where some equity was not the foundation of the bill. (2 High on Injunctions, Sec. 1326.) * * * The complainant [18] who seeks an injunction must be able to specify some particular act, the performance of which will damnify him. * * * This Court has no power to examine an act of the legislature generally, and declare it unconstitutional. The limit of our authority in this respect is to disregard, as in violation of the constitution, any act or part of an act which stands in the way of the legal rights of a suitor before us; but a suitor who calls upon a court of chancery to arrest the performance of a duty imposed by the legislature upon a public officer must show conclusively, not only that the act about to be performed is unconstitutional, but also that it will inflict a direct injury upon him."

State *ex rel.* Taylor vs. Pennoyer, 37 Pac. 906–7–8.

A fuller discussion of this matter by Judge Wolverton is to be found in the case of State *ex rel.* Taylor v. Lord, 43 Pac. page 471. It is there said:

"The judiciary takes cognizance of such proceedings only, if at all, which operate incidentally as a check upon a co-ordinate branch of government. It may, in a proper case, proceed against an officer engaged in the discharge of purely ministerial functions, which may indirectly or incidentally affect the acts of a co-ordinate branch, and even nullify and render

them inoperative; but directly, as against officers acting in a political, governmental, or discretionary capacity, it never has and never will, so long as the relative duties and powers of the co-ordinate departments are justly observed. Gaines vs. Thompson, *supra.* Moreover, it is not fit that these great powers, pertaining to sovereignty, which affect the whole people alike and none less nor more than the rest, should be invoked by individual citizens, or by a class or classes, or body corporate, or an aggregation thereof less than the whole state. State officers should not be subjected to the annoyance of a suit at the instance of every individual when civil or property rights are not invaded, who might conceive that the laws were not being applied to legitimate public purposes. State government being divided into three co-ordinate branches,—executive, legislative, and judicial,—it is most essential to the preservation of the autonomy of government that there be no encroachment of one branch upon another. And to this end the just limitations of the constitutional powers accorded to either branch should be nicely defined and jealously guarded. But sometimes one branch of government, in the discharge of its co-ordinate functions, oversteps the limit of its constitutional powers. In such a case one or both of the other branches of government may operate as a check upon its action. The legislature may pass an act in disregard of the inhibitions of the constitution. The executive

may veto the measure, or failing to do so, the judiciary may refuse to recognize it as controlling. The Governor acts upon his own motion, and by right of high constitutional powers and privileges reposed in him. The judiciary acts, not upon its own motion, but only when suitor duly authorized by law presents, in due form, a cause appropriate for its cognizance. Its machinery may be set in motion by private suitors, in some form or another, in all cases where civil or property rights are being invaded or intrenched upon to their injury or damage, be the suitor ever so humble, or the injury to be encountered ever so small; but in all cases of purely public concern, affecting the welfare of the whole people, or the State at large, the Court's action can only be [19] invoked by such executive officers of State as are by law intrusted with the discharge of such duties."

The demurrer will be sustained.

ROBERT W. JENNINGS,
Judge. [20]

In the District Court for Alaska, Division Number One, at Juneau.

No. 1323–A.

CHAS. A. SULZER et als.,
Plaintiffs,

vs.

WALSTEIN G. SMITH, as Treasurer of the Territory of Alaska,
Defendant.

Order Sustaining Demurrer.

This cause came on regularly to be heard upon the demurrer of the defendant to the complaint herein, Mr. Cobb appearing for said demurrer and Mr. Heid, *contra;* and the Court having heard said demurrer, and the argument of counsel thereon, and being fully advised in the premises, finds the law for the defendant.

It is therefore considered by the Court, and it is so ordered, adjudged and decreed, that said demurrer be, and the same is hereby, sustained; to which ruling of the Court, the plaintiffs, by their attorney, then and there excepted.

Upon application of the plaintiffs, they are allowed sixty days to take further proceedings herein as they may be advised.

Dated August 11th, 1915.

ROBERT W. JENNINGS,
Judge.

Entered Court Journal No. L, page 65.

Filed in the District Court, District of Alaska, First Division. Aug. 12, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. [21]

In the District Court for the Territory of Alaska, Division Number One, at Juneau.

No. 1323–A.

CHAS. A. SULZER et als.,

Plaintiffs,

vs.

WALSTEIN G. SMITH, as Treasurer of the Territory of Alaska,

Defendant.

Final Judgment.

This cause having heretofore come on for hearing upon the demurrer of the defendant to the complaint of the plaintiffs, which said demurrer was, on August 11th, 1915, sustained; and the plaintiffs having been allowed eighty days from and after said date to take such further proceedings herein as they may be advised, and said eighty days having expired and plaintiffs having failed to amend, or to take other proceedings, but electing to stand upon said complaint, now on motion of Mr. J. H. Cobb for a judgment for the defendant.

IT IS CONSIDERED BY THE COURT, and so ordered, adjudged and decreed that the plaintiffs' complaint herein be, and the same is hereby, dismissed; and it is further ordered that the defendant have and recover of the plaintiffs his costs herein incurred. Thirty days to plaintiff to file Bill of Exceptions.

Done in open court this the 8th day of November, A. D. 1915.

ROBERT W. JENNINGS,
Judge.

Entered Court Journal No. L, page 166.

Filed in the District Court, District of Alaska, First Division. Nov. 8, 1915. J. W. Bell, Clerk. By C. Z. Denny, Deputy. **[22]**

In the District Court for the District of Alaska, at Juneau, Division No. 1.

No. 1323–A.

CHARLES A. SULZER, J. M. TANNER, JOHN R. HECKMAN, ARTHUR G. SHOUP, WILLIAM E. BRITT, and JOHN G. HEID, for Themselves and as Representatives of and for the People of Judicial Division No. 1, Southeastern Alaska,

Plaintiffs,

vs.

WALSTEIN G. SMITH, as Treasurer of and for the Territory of Alaska,

Defendant.

Bill of Exceptions.

Be it remembered that on this 22d day of July, 1915, the above-entitled cause came on regularly to be heard upon the demurrer of the above-named defendant, Walstein G. Smith, as treasurer of and for the Territory of Alaska, against the complaint of plaintiffs herein, and filed the 6th day of July, 1915; the grounds of said demurrer being:

1. That plaintiffs have no capacity to maintain this suit.

2. That said complaint does not state facts sufficient to constitute a cause of suit, in this:

(a) It appears from said complaint that the Act mentioned in paragraph 7 of said complaint is a general appropriation by Congress of certain funds of the Federal Government; that under said Act the defendant received and holds the sum of $52,968.17; that said fund so received and held is to be expended under the terms of the grant, "as the Territorial Legislature may prescribe for the benefit of the public schools and public roads; that the Act of the Alaska Legislature mentioned in paragraph 9 of said complaint is a valid exercise of the power contained in said grant.

(b) It is not alleged that the forest reserve from which said moneys were derived is situated within the boundaries of any county, or that complainants reside in any county whereby they or it are **[23]** entitled to any exclusive benefit therefrom.

(c) No facts are alleged showing that the complainants or the people of Judicial Division Number One, are entitled to have said moneys expended in said division otherwise than prescribed by the Alaska Legislature.

(d) No sufficient facts are alleged to render said Act of the Alaska Legislature void for uncertainty.

(e) No facts are alleged showing why or in what respect said Act of the Alaska Legislature is in conflict with the Act of Congress of May 23, 1908.

(f) No facts are alleged, showing why or in what respect the said Act of the Alaska Legislature alters, amends, modifies or repeals the Act entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes."

(g) No facts are alleged showing why or under what grant or title Judicial Division Number One is entitled to have and use all of said sum of $52,968.17.

3. The Court has no jurisdiction of the cause of action, in that the complainants seek to have the Court by its decree modify and control a legislative appropriation of public moneys, and substitute such decree for the Legislative Act.

The Court having heard the argument of counsel, sustained said demurrer in favor of defendant and against said plaintiffs, to which ruling of said Court, the defendants then and there excepted, which exception was then and there by the Court allowed. And the defendants, after further time granted to them within which to take such other or further steps in the premises as they may deem advised, to wit, on the 8th day of November, 1915, announced in open court that they did not intend to further plead, but desired to stand upon their Bill of Complaint; **[24]**

The Court thereupon made and entered the following final Judgment:

No. 1323–A.

CHARLES A. SULZER et al.,

vs.

WALSTEIN G. SMITH, as Treasurer of the Territory of Alaska.

Final Judgment.

This cause having heretofore come on for hearing upon the demurrer of the defendant to the complaint of the plaintiffs, which said demurrer was on August 11th, 1915, sustained; and the plaintiffs having been allowed eighty days from and after said date to take such further proceedings herein as they may be advised, and said eighty days having expired and plaintiffs having failed to amend, or take other proceedings, but electing to stand upon said Complaint, now on motion of Mr. J. H. Cobb for judgment for the defendant;

IT IS CONSIDERED BY THE COURT, and so ordered, adjudged and decreed that the plaintiffs' complaint herein be and the same is hereby, dismissed, and it is further ordered that the defendant have and recover of the plaintiffs his costs herein incurred.

Done in open court this 8th day of November, 1915.

R. W. JENNINGS,

Judge.

—to all of which said judgment and entry thereof the plaintiffs then and there excepted and exception was allowed by the Court.

Order Settling Bill of Exceptions.

The above and foregoing Bill of Exceptions having been duly presented for settlement by the plaintiffs within the time allowed by law, and rules of this court, and the said Bill of Exceptions being full, true, and correct, the same is hereby settled and allowed by the undersigned. **[25]**

January 17, 1916.

ROBERT W. JENNINGS,
Judge Who Tried Said Cause.

Filed in the District Court, District of Alaska, First Division. Dec. 13, 1915. J. W. Bell, Clerk. By ————, Deputy.

Filed in the District Court, District of Alaska, First Division. Jan. 17, 1916. J. W. Bell, Clerk. By ————, Deputy.

[Endorsed]: No. 1323–A. In District Court for Alaska, Division No. 1. Charles A. Sulzer et al. vs. Walstein G. Smith, as Treasurer. Bill of Exceptions. Received copy of within Bill of Exceptions this 13th day Dec., 1915. J. H. Cobb. By E. L. Cobb. **[26]**

In the District Court for the District of Alaska, at Juneau, Division No. 1.

No. 1323–A.

CHARLES A. SULZER, J. M. TANNER, JOHN R. HECKMAN, ARTHUR G. SHOUP, WILLIAM E. BRITT, and JOHN G. HEID, for Themselves and as Representatives of and for the People of Judicial Division No. 1, Southeastern Alaska,

Plaintiffs,

vs.

WALSTEIN G. SMITH, as Treasurer of and for the Territory of Alaska,

Defendant.

Assignment of Errors.

And now come the plaintiffs and appellants and present this, their assignment of errors and herein specifically point out the errors on which they rely on this appeal:

I.

The Court erred in sustaining defendant's demurrer to plaintiffs' complaint, which was a general and special demurrer, for this:

The facts stated in said complaint constituted a complete cause of action in that it appeared that the Territory of Alaska is divided into four Judicial Divisions, that the complainants Charles A. Sulzer and J. M. Tanner, are the duly elected, acting and qualified senators of and for said Division No. 1,

and that John R. Heckman, Arthur G. Shoup, William E. Britt and John G. Heid, are the representatives of said Division, (being Judicial No. 1, aforesaid), in the Legislature of Alaska, and that said senators and representatives bring this suit for themselves, and for all the people of said Division No. 1, of Alaska; that the Tongass National Forest Reservation was created by proclamation of the President of the United States, and is all situated in and within said Division No. 1; that the Congress of the United States, by its Act, approved May 23, 1908, directed that twenty-five per centum of all moneys received from each forest reserve shall be paid by the Secretary of the Treasury of the United States to the State or Territory **[27]** in which said forest reserve is situated, to be expended by the State or Territorial legislature for the benefit of public schools and public roads of the county or counties in which the forest reserve is situated; that by virtue of said Act of Congress said Division No. 1 is entitled to have and receive the sum of fifty-two thousand nine hundred sixty-eight and 17/100 dollars ($52,968.17) of such forestry fund or money, paid by the Secretary of the Treasury of the United States to the Territory of Alaska, to its treasurer, the defendant herein, on account of said Tongass National Forest Reservation, situated wholly in and within said Division No. 1; that the Alaska Territorial Legislature in 1915 enacted a law creating four road districts, to consist of said four Judicial Divisions of Alaska, and further dividing said forestry fund or money belonging to said

Judicial Division No. 1, equally, among all of said four Divisions; that such law enacted by said territorial legislature is unconstitutional; that the said pretended law is void for uncertainty, and is in conflict with section 3 of the Organic Act of the Territory of Alaska, passed by the Congress of the United States, approved August 24, 1912, entitled "An Act to create a legislative assembly in the Territory of Alaska, to confer legislative power thereon, and for other purposes," in that said section 3 of said "Organic Act" does not extend the authority of the legislative assembly, created by said Act, to alter, amend, modify and repeal the Act of Congress entitled "An Act to provide for the construction and maintenance of roads, the establishment and maintenance of schools, and the care and support of insane persons in the District of Alaska, and for other purposes," approved August 27, 1905.

II.

The Court erred in sustaining defendant's demurrer, further, for this: In holding that the plaintiffs had not the capacity to maintain this suit.

III.

The Court erred in entering its decree in favor of the defendant and against plaintiffs, instead of entering the decree in favor of the plaintiffs.

WHEREFORE, plaintiffs pray for a reversal of said judgment and [28] decree, and that a decree be entered in favor of plaintiffs and against the defendant herein, and for such other and further relief as may seem meet and proper.

JOHN G. HEID,
Attorney for Appellants.

Filed in the District Court, District of Alaska, First Division, Oct. 25, 1916. J. W. Bell, Clerk. By ————, Deputy. **[29]**

In the District Court for the District of Alaska, at Juneau, Division No. 1.

No. 1323–A.

CHARLES A. SULZER, J. M. TANNER, JOHN R. HECKMAN, ARTHUR G. SHOUP, WILLIAM E. BRITT and JOHN G. HEID, for Themselves and as Representatives of and for the People of Judicial Division No. 1, Southeastern Alaska,

Plaintiffs,

vs.

WALSTEIN G. SMITH, as Treasurer of and for the Territory of Alaska,

Defendant.

Petition on Appeal.

The above-named plaintiffs conceiving themselves aggrieved by the decree and final judgment made and entered in the above-entitled suit, on the 9th day of November, 1915, hereby appeal from said decree and judgment to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors which is filed herewith, and prays that this appeal be allowed, and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated, be sent to the United

States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

JOHN G. HEID,
Attorney for Complainants.

The foregoing appeal is allowed this 25th day of October, 1916.

ROBERT W. JENNINGS,
Judge of the District Court for the District of Alaska, Division No. 1.

Filed in the District Court, District of Alaska, First Division, Oct. 25. 1916. J. W. Bell, Clerk. By ————, Deputy. **[30]**

In the District Court for the District of Alaska, at Juneau, Division No. 1.

No. 1323–A.

CHARLES A. SULZER, J. M. TANNER, JOHN R. HECKMAN, ARTHUR G. SHOUP, WILLIAM E. BRITT and JOHN G. HEID, for Themselves and as Representatives of and for the People of Judicial Division No. 1, Southeastern Alaska,

Plaintiffs,

vs.

WALSTEIN G. SMITH, as Treasurer of and for the Territory of Alaska,

Defendant.

Citation on Appeal.

To Walstein G. Smith, as Treasurer of and for the Territory of Alaska, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, California, within thirty days from the date hereof, pursuant to an order allowing an appeal to said Court, of the above-entitled cause, entered in the Clerk's Office of said District Court of Alaska, for Division No. 1, in case No. 1323–A, on the 25th day of October, 1916, wherein Charles A. Sulzer, J. M. Tanner, J. R. Heckman, Arthur G. Shoup, William E. Britt and John G. Heid for themselves and others are appellants and Walstein G. Smith, as Treasurer of and for the Territory of Alaska, is respondent, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice done to the parties in that behalf.

Done in open court at Juneau, Alaska, this 25th day of October, 1916.

ROBERT W. JENNINGS,
Judge of District Court for the District of Alaska, Division No. 1. **[31]**

Service of a copy of the foregoing citation is hereby admitted at Juneau, Alaska, this 25th day of October, 1916.

J. H. COBB.
By E. L. Cobb,
Attorney for Defendant.
WALSTEIN G. SMITH,
As Treasurer, etc.

Filed in the District Court, District of Alaska, First Division. Oct. 25, 1916. J. W. Bell, Clerk. By ————, Deputy. **[32]**

In the District Court for the District of Alaska, at Juneau, Division No. 1.

CHARLES A. SULZER, J. M. TANNER, JOHN R. HECKMAN, ARTHUR G. SHOUP, WILLIAM E. BRITT and JOHN G. HEID, for Themselves and as Representatives of and for the People of Judicial Division No. 1, Southeastern Alaska,

Plaintiffs,

vs.

WALSTEIN G. SMITH, as Treasurer of and for the Territory of Alaska,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, Charles A. Sulzer, J. M. Tanner, John R. Heckman, Arthur G. Shoup, William E. Britt, and John G. Heid as principals, and George F. Miller, and Guy McNaughton, as sureties, are held and firmly bound unto Walstein G. Smith, as Treasurer of and for the Territory of Alaska, in the penal sum of two hundred and fifty dollars ($250), to the payment of which well and truly to be made we bind ourselves, our, and each of our heirs, executors, administrators or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of October, 1916.

NOW THE CONDITION of the above bond and obligation is such, that whereas, the above plaintiffs, Charles A. Sulzer, J. M. Tanner, John R. Heckman, Arthur G. Shoup, William E. Britt, and John G. Heid, for themselves and as representatives of and for the people of Judicial Division No. 1, Southeastern Alaska, have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, praying in such appeal for a reversal of a decree rendered in the above-entitled court and cause in favor of said defendant, Walstein G. Smith, as Treasurer of and for the Territory of Alaska, and against the said plaintiffs; **[33]**

NOW, THEREFORE, if the above-named plaintiffs shall prosecute said appeal to effect, and answer all costs if they fail to make said appeal good, then this obligation shall be void and of no effect; otherwise the same shall remain in full force, virtue and effect.

JOHN G. HEID, (LS)
For Himself and as Attorney of Record for
CHARLES A. SULZER, (LS)
J. M. TANNER, (LS)
J. R. HECKMAN, (LS)
WILLIAM E. BRITT, (LS)
ARTHUR G. SHOUP, (LS)
Principals.
GEORGE F. MILLER, (LS)
GUY McNAUGHTON, (LS)
Sureties.

United States of America,
District of Alaska,—ss.

We, George F. Miller and Guy McNaughton, the sureties in the above obligation, being first duly sworn, according to law, each for himself, and not for the other, deposes and says: I am a resident of the District of Alaska, am in all ways qualified to become surety on bail, that I am worth the sum of five hundred dollars in property situated within said District, over and above all my just debts and liabilities and obligations, exclusive of property exempt from execution and forced sale.

GEORGE F. MILLER,
GUY McNAUGHTON,

Subscribed and sworn to before me this 24th day of October, 1916.

[Notarial Seal] R. H. STEVENS,
Notary Public.

My commission expires December 30, 1919.

Filed in the District Court, District of Alaska, First Division. Oct. 25, 1916. J. W. Bell, Clerk. By ————, Deputy.

Approved Oct. 25/16.

R. W. JENNINGS,
Judge. **[34]**

In the District Court for the District of Alaska, Division Number One, at Juneau.

CHARLES A. SULZER, J. M. TANNER et al.,
Plaintiffs,

vs.

WALSTEIN G. SMITH, as Treasurer of and for the Territory of Alaska,
Defendant.

Praecipe for Transcript of Record.

To the clerk of the above-entitled court.

Please prepare a transcript of the record in the above-entitled and numbered cause, for transmission to the United States Appellate Court for the Ninth Circuit at San Francisco, State of California, including the following:

1. Complaint.
2. Demurrer to Complaint.
3. Memorandum Opinion.
4. Order Sustaining Demurrer.
5. Final Judgment.
6. Bill of Exceptions.
7. Assignment of Errors.
8. Petition on Appeal.
9. Citation.
10. Bond.

JOHN G. HEID,
Atty. for Appellants.

Filed in the District Court, District of Alaska, First Division, Oct. 25, 1916. J. W. Bell, Clerk. By By L. E. Spray, Deputy. [35]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska, Division No. 1,—ss.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 35 pages of typewritten matter, numbered from 1 to 35, both inclusive, constitute a full, true, and complete copy, and the whole thereof of the record prepared in accordance with the praecipe of attorney for plaintiffs and appellants on file in my office and made a part hereof, in Cause No. 1323–A, wherein Charles A. Sulzer, J. M. Tanner, John R. Heckman, Arthur G. Shoup, William E. Britt and John G. Heid, for themselves and as Representatives of and for the People of Judicial Division No. 1, Southeastern Alaska are the plaintiffs and appellants and Walstein G. Smith, as Treasurer of the Territory of Alaska is defendant and appellee.

I further certify, that the said record is by virtue of the petition on appeal and citation issued in this cause and the return thereof in accordance therewith.

I further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate, amounting to sixteen and 95/100 dollars ($16.95) has been paid to me by counsel for appellants.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled Court this 25th day of October, 1916.

[Seal] J. W. BELL,
Clerk,
By ————————,
Deputy.

[Endorsed]: No. 2872. United States Circuit Court of Appeals for the Ninth Circuit. Charles A. Sulzer, J. M. Tanner, J. R. Heckman, Arthur G. Shoup, William E. Britt and John G. Heid, Appellants, vs. Walstein G. Smith, as Treasurer of and for the Territory of Alaska, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed November 2, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 2873

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH PABLO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filed
NOV 13 1916
F. D. Monckton,
Clerk.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 2873

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOSEPH PABLO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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B. K. WHEELER, Esq., U. S. Attorney, of Butte, Montana;

HOMER G. MURPHY, Esq., Assistant U. S. Attorney, of Helena, Montana;

FRANK WOODY, Esq., Assistant U. S. Attorney, of Butte, Montana;

Attorneys for Plaintiff and Defendant in Error.

ALBERT BESANCON, Esq., of Missoula, Montana;

JOHN P. SWEE, Esq., of Ronan, Montana;

Attorneys for Defendant and Plaintiff in Error. [1*]

In the District Court of the United States in and for the District of Montana.

No. 2732.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

BE IT REMEMBERED, that on the 28th day of October, A. D. 1915, the Grand Jury of said court presented an Indictment against the defendant herein, in the words and figures following, to wit: [2]

*Page-number appearing at foot of page of original certified Transcript of Record.

Indictment.

United States of America,
District of Montana,—ss.

In the District Court of the United States within and for the District of Montana, of the September term of said District Court held at Butte, Silver Bow County, in said District of Montana, in the year of our Lord one thousand nine hundred and fifteen.

The grand jurors of the United States of America, duly impanelled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States, within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That one Joseph Pablo, late of the State and District of Montana, on the 6th day of September, A. D. 1915, at and within the State and District of Montana, did then and there wrongfully unlawfully and feloniously introduce a large quantity of spirituous and intoxicating liquor, commonly called whiskey, in quantity about one quart, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the state and district of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and

provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said Joseph Pablo, late of the State and District of Montana, on the 5th day of September, A. D. 1915, at and within [3] the State and District of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous and intoxicating liquor, commonly called whiskey, in quantity about three quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the State and District of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said Joseph Pablo, late of the State and District of Montana, on the 5th day of October, A. D. 1915, at and within the State and District of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous

and intoxicating liquor, commonly called whiskey, in quantity about four quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the State and District of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

B. K. WHEELER,
United States Attorney, District of Montana.
HOMER G. MURPHY,
Assistant U. S. Attorney, District of Montana. [4]

[Indorsed]: No. 2732. United States District Court, District of Montana. United States of America vs. Joseph Pablo. Indictment, a True Bill. W. F. Noyes, Foreman of Grand Jury. B. K. Wheeler, U. S. Attorney, District of Montana. Homer G. Murphy, Assistant U. S. Attorney, District of Montana. Witnesses: John Lamoose, Henry Matt, John Matt, Harry Pritchett, Lucy Kirkpatrick, Napoleon Demontier, R. J. Holland, Harry Haines, Frank Kirkpatrick, Lawrence Pritchett, Phil Hull, Chas. Stevenson, Chas. Hunter, Andrew Gilbeau, J. W. Ramsey, Octave Couture. Presented by the Grand Jury in Open Court, by their Foreman, in Their Presence, and filed this 28th day of Oct. A. D. 1915. Geo. W. Sproule, Clerk.

Thereafter, on March 7, 1916, a Bench Warrant for said defendant was duly issued, in the words and figures following, to wit: [5]

Bench Warrant.

United States of America,
District of Montana,—ss.

To the Marshal of the United States of America, for the District of Montana, and his Deputies, or any or either of them, Greeting:

WHEREAS, at a District Court of the United States of America, for the District of Montana, begun and held at the city of Butte within and for the District aforesaid, on the 28th day of October, in the year of our Lord one thousand nine hundred and fifteen, the Grand Jurors in and for the said District, brought into the said court a true bill of indictment against Joseph Pablo for violation of section 2139 as amended, as by the said indictment, now remaining on file and of record in said court, will more fully appear; to which Indictment the said Joseph Pablo has not yet appeared or pleaded:

NOW, THEREFORE, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Joseph Pablo and him bring before the said Court, at the United States District courtroom, in the Federal Building at ————, Montana, to answer the Indictment aforesaid.

WITNESS, the honorable GEO. M. BOURQUIN, Judge of the United States District Court, for the District of Montana, and the seal of said District

Court, this 7th day of March, in the year of our Lord one thousand nine hundred and sixteen and of our Independence the 140.

[Seal] GEO W. SPROULE,
Clerk.

[Endorsed]: No. 2732. United States District Court, District of Montana. United States of America vs. Joseph Pablo. Bench Warrant. Bail Fixed at $250. Filed Mar. 11th, 1916. Geo. W. Sproule, Clerk. [6]

Return on Service of Writ.

United States of America,
District of Montana,—ss.

I hereby certify and return that I executed the within warrant by arresting the within-named Joseph Pablo on the 8th day of March, 1916, at Missoula, in Missoula County, State and District of Montana, that on the same day I conducted him before Wallace P. Smith, U. S. Commissioner at Missoula, Montana, who admitted him to bail to appear at Great Falls, Montana, March 14th, 1916, whereupon I released said Joseph Pablo.

JOSEPH L. ASBRIDGE,
U. S. Marshal.
By J. W. Rickman,
Deputy. [7]

Thereafter, on March 14th 1916, defendant was duly arraigned, pleaded not guilty and the case was set for trial, the journal entry thereof being as follows, to wit:

In the District Court of the United States, District of Montana.

No. 2732.

THE UNITED STATES

vs.

JOSEPH PABLO.

Arraignment and Plea.

Defendant with his attorney, John P. Swee, Esq., present in court, and being arraigned the defendant answered that his true name is Joseph Pablo; and thereupon indictment read to defendant; and thereupon defendant pleaded that he is not guilty and plea entered. Thereupon case set for trial at Missoula, April 13, 1916.

Entered in open court, March 14, 1916.

GEO. W. SPROULE,
Clerk. [8]

Thereafter, on April 14, 1916, the Verdict of the jury was duly filed herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH PABLO,
Defendant.

Verdict.

We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in count three of the Indictment, and not guilty as to count one and two.

H. H. MONTGOMERY,
Foreman.

Filed April 14, 1916. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.

Thereafter, on April 17, 1916, Judgment was duly entered herein, in the words and figures following, to wit: [9]

In the District Court of the United States, District of Montana.

No. 2732.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH PABLO,
Defendant.

Judgment.

The United States Attorney with the defendant and his counsel present in court.

The defendant was duly informed by the court of the nature of the charge against him, for the offense of unlawfully and feloniously introducing spirituous and intoxicating liquors into the Flathead Indian Reservation in the State and District of Montana, committed on the 5th day of October, 1915, at and within the State and District of Montana, as charged in count three of the indictment herein; and of his indictment, arraignment and plea of not guilty, and of his trial and the verdict of guilty as charged in said count three of said indictment.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas, the said defendant having been duly convicted in this court of the offense of unlawfully and feloniously introducing spirituous and intoxicating liquors into the Flathead Indian Reservation in the State and District of Montana, committed on the 5th day of October, 1915, at and within the State and District of Montana, as charged in count three of the indictment herein;

It is therefore considered, ordered and adjudged that for said offense you, the said Joseph Pablo, be confined and imprisoned in the Missoula County Jail

at Missoula, Montana for the term of seventy-five days, and that you pay a fine of One Hundred Dollars, and costs taxed at Two Hundred Ninety-four and 10/100 Dollars, and be confined in said County Jail until said fine and costs are paid or you are otherwise discharged according to law.

Judgment rendered and entered this 17th day of April, 1916.

GEO. W. SPROULE,
Clerk.

ATTEST a true copy of Judgment:

GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk. [10]

Certificate to Judgment-roll.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed, constitute the Judgment-Roll in the above-entitled action.

Witness my hand and the seal of said court at Missoula, Montana, this 17th day of April, A. D. 1916.

[Seal] GEO. W. SPROULE,
Clerk.

[Indorsed]: Title of Court and Cause. Judgment-roll. Filed April 17, 1916. Geo. W. Sproule, Clerk. [11]

Thereafter, on June 30, 1916, defendant's Bill of Exceptions, as settled and allowed, was duly filed herein, in the words and figures following, to wit: [12]

Names and Addresses of Attorneys of Record.

BURTON K. WHEELER, Esq., United States Attorney, HOMER G. MURPHY, Esq., Assistant United States Attorney, both of Butte, Montana,

Attorneys for the United States, Plaintiff.

ALBERT BESANCON, Esq., Missoula, Montana, JOHN P. SWEE, Esq., Ronan, Montana,

Attorneys for the Defendant. [17]

In the District Court of the United States, for the District of Montana.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that heretofore, to wit, on the 28th day of October, 1915, there was presented and filed in this court an indictment against the defendant, which said indictment is in words and figures as follows, to wit:

Indictment.

United States of America,
District of Montana,—ss.

In the District Court of the United States, within and for the District of Montana, of the September term of said District Court held at Butte, Silver Bow County, in said District of Montana, in the year of our Lord one thousand nine hundred and fifteen.

The grand jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United [18] States, within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That one Joseph Pablo, late of the State and District of Montana, on the 6th day of September, A. D. 1915, at and within the State and District of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous and intoxicating liquor, commonly called whiskey, in quantity about one quart, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the State and District of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made

and provided, and against the peace and dignity of the United States of America.

SECOND COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said Joseph Pablo, late of the State and District of Montana, on the 5th day of September, A. D. 1915, at and within the State and District of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous and intoxicating liquor, commonly called whiskey, in quantity [19] about three quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the State and District of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further find, charge and present:

That the said Joseph Pablo, late of the State and District of Montana, on the 5th day of October, A. D. 1915, at and within the State and District of Montana, did then and there wrongfully, unlawfully and feloniously introduce a large quantity of spirituous

and intoxicating liquor, commonly called whiskey, in quantity about four quarts, the exact quantity of which is to the grand jurors aforesaid unknown, into the Flathead Indian Reservation, within the State and District of Montana, the said Flathead Indian Reservation then and there being an Indian country, under the charge of Fred C. Morgan, then and there the superintendent and special disbursing agent in charge of the said Flathead Indian Reservation; contrary to the form [20] of the statute in such case made and provided, and against the peace and dignity of the United States of America.

B. K. WHEELER,
United States Attorney, District of Montana.

[Endorsed]: No. ——. United States District Court, District of Montana. United States of America vs. Joseph Pablo. Indictment: A True Bill. W. F. Noyes, Foreman of Grand Jury. B. K. Wheeler, United States Attorney. District of Montana. Homer G. Murphy, Asst. U. S. Atty., Dist. of Mont. Witnesses: John Lamoose, Henry Matt, Harry Pritchett, Lucy Kirkpatrick, Napoleon Demontier, R. J. Holland, Harry Haines, Frank Kirkpatrick, Lawrence Pritchett, Phil Hull, Chas. Stevenson, Chas. Hunter, Andrew Gilbeau, J. W. Ramsey, Octave Couture. Presented by the grand jury in open court by their foreman, in their presence, and filed this 28th day of October, A. D. 1915. Geo. W. Sproule, Clerk. By ————, Deputy.

And thereafter, on the 16th day of March, 1916, the defendant appeared in person and with his counsel and was arraigned and answered that his true

name was Joseph Pablo, and entered a plea of not guilty.

And thereafter, on the 13th day of April, 1916, this cause came on regularly for trial in the above-entitled court, before the Hon. George M. Bourquin, Judge presiding, when the following proceedings were had, to wit: A jury was impaneled and sworn to [21] try said cause, and thereupon B. K. Wheeler, Esq., United States Attorney, and Homer G. Murphy, Esq., Assistant United States Attorney, appearing on behalf of the plaintiff, Albert Besancon, Esq., and John P. Swee, Esq., appearing on behalf of the defendant, and thereupon the following testimony was introduced and offered on behalf of the United States, the plaintiff, and on behalf of the defendant, as follows, to wit:

Testimony of Charles Hunter, for Plaintiff.

CHARLES HUNTER, being called as a witness, and being about to be sworn on behalf of the plaintiff, Mr. Besancon stated:

At this time we object to the witness being sworn to testify in this case upon the ground that he is incompetent to testify, having been convicted in this court of a felony, and judgment having been passed upon him in the month of February, 1914.

By Mr. MURPHY.—If the Court please, I have here a telegram, pardoning the witness, and restoring him to citizenship.

By the COURT.—Well, they seem to have met the situation, Mr. Besancon.

By Mr. BESANCON.—Of course we cannot question the telegram, but still we object to its being re-

(Testimony of Charles Hunter.)

ceived as evidence until the pardon itself is produced.*

By the COURT.—The pardon is an act of the executive of the United States, and when it is brought into this court, it is entitled to judicial notice without any proof at all. Of course, when it [22] said the President has done a certain act, the Court must take notice of it. I think the telegram satisfies the Court, that it is so at this time. The objection will be overruled.

Exception taken by the defendant.

By the COURT.—As a matter of course, if there was any mistake, why, it would always be cause for setting aside a verdict, should there be one, or of any judgment; so no harm can be done in proceeding.

Thereupon CHARLES HUNTER was sworn as a witness on behalf of the Government, and testified as follows:

Direct Examination by Mr. MURPHY.

My name is Charles Hunter. I live in Washington at the present time. I am acquainted with the defendant Joseph Pablo and have known him for quite a good many years. I could not say just how long. In the fall of 1915 I was living at Arlee with Joe Pablo. I was in Missoula the first part of October of last year. I was working for Joe Pablo.

*It was stated by the District Attorney that the telegram was from the Department of Justice that the President had pardoned the witness, Hunter, and the Court read the telegram.—B.

(Testimony of Charles Hunter.)

I could not say just how long I did work for him—a month, anyway. It was along about the 25th of October when I was in Missoula. Somewhere along there. I couldn't recall the date exactly. I do not recall the time that Pablo was arrested; that is, I cannot remember the day, but I remember the fact that he was arrested. I was in Missoula a couple of days before he was arrested and left Missoula [23] about 11 o'clock in the morning with Joe Pablo, Philip Hull, Lawrence Pritchett, and Charlie Stevens. We left in an automobile. I came to town with Louis Pablo—no, it was not with Louis I came, —I forget now who I did come in with. I saw Joe Pablo in the morning before I left town with him. Saw him on the street. Lawrence Pritchett was with him then, and believe that Philip Hull was with him also. This was around on Higgins Avenue. Joe then said we would go out pretty quick. I don't remember that he said or did anything else just then. We did get something that day before we left town. We got whiskey. Seven dollars worth in all. There was two pints came from up here, the Frog Pond, they call it. This Frog Pond is over on West Front Street. When I got the whiskey at the Frog Pond Lawrence Prichett was with me. I paid two dollars for it. This was Joe Pablo's money. I got the money from Joe Pablo just a little while before I went there. Two dollars was the amount. I then got two pints and brought them to the car. The car was waiting for us there on Higgins Avenue. When I got to the car I put them in the hind seat. At that

(Testimony of Charles Hunter.)

time there was with me in the car Philip Hull, Joe Pablo, and Lawrence Pritchett. Charlie Stevens was not with us then. He got on here out of town. Just west of town. After that we went down around by the depot and up to the Montana Bar, where we got some whiskey, also three quarts and two pints of beer. I got this and paid five dollars for it. I got the money [24] from Joe—that he gave me by the corner at Schlossberg's. That was while we were at the machine, on the front step. At that time Lawrence Pritchett, myself, Louis Pablo and Charlie Stevens were present. The two pints that we got at the Montana Bar we put into the car in the hind seat, in the hind end; right in the car, inside of it and on the bottom of the car. At that time Joe was sitting in the front seat; Philip Hull was driving the car. Lawrence Pritchett was in the hind seat with me. We left town then. The car was going to Ronan on the Flathead Indian Reservation. When we started and as we were going along we were drinking a little. The car first stopped about three or four miles out of town. We had a bottle there. Phil Hull stopped the car. Somebody said to stop it. There was a bottle there. They said they had a bottle there and they stopped the car. We took the bottle. The car did not turn around or anything; it backed up. I could not say just how far it backed up. A bottle was obtained at that place. I don't remember who got it. It was put in the car. The contents of the bottle were whiskey. The kind of whiskey we bought in town that morning was Joel B. Fraser.

(Testimony of Charles Hunter.)

After we picked this bottle up on the road we went on. As we were driving along there was some drinking in the car. We were all drinking. We were all pretty near drunk. By all I mean myself, Lawrence Pritchett, Joe Pablo and Charlie Stevens. We were drinking whiskey from a pint bottle. I don't remember how many pints were drank. [25] We were drinking along the road there. These were the pint bottles that we got at the Frog Pond. I don't know how many times we drank out of the bottle—I couldn't say. More than once. As to the condition of the people in the car, Charlie Stevens was a little full. He was the only one that I know of. I was there. Charlie Stevens, Louis Pablo and Lawrence Pritchett were drinking. The car went out to Joe Pablo's place. Before that we went to Johnny Matt's place. There Charlie Stevens got out. At Johnny Matt's place there was some drinking. We all drank. By all, I mean Joe and Louis and Lawrence Pritchett and Charlie Stevens. I couldn't say whether Philip Hull was drinking that day or not. From there the car went to Octave Couture's. Stevens got out at Johnny Matt's place. We had a drink at Octave Couture's place—Octave Couture, Lawrence Pritchett, myself and Joe Pablo. After that we turned around and went back to Pritchett's place. Pritchett lives out of Arlee some place there. At Pritchett's Lawrence Pritchett got out there. The car then went to Joe Pablo's, about three miles the other side of Arlee. At Joe Pablo's place we stopped for dinner. I couldn't say what time we

(Testimony of Charles Hunter.)

got to Joe's place. We stayed there just about the time we ate dinner. I believe that I did have a drink there. When we got to Joe's place the bottles that were obtained at the Montana saloon or bar were in under the seat, the hind seat. I put them there. I put them there on the road four or five miles from Missoula. At Joe's place we took out [26] the bottles and then we got in the car and we put them back in again. I took them out of the car. When I got back in we had them up in front. I just took them out and then I put them back, in the front seat. When I got back in the car Joe Pablo, Phil Hull, myself, and Joe Pablo's wife and kids, were in the car. There were three children. I sat in the front seat with Philip Hull. Pablo sat in the hind seat with his wife. One of the children sat in the front seat and the other two in the back. From Pablo's the car went to Ronan. On the road between Joe's place and Ronan we met Louis Pablo. We met him on the other side of Ravalli. He was afoot. We picked him up. When we got to between Ronan and the Mission there was an automobile went up ahead of us and stopped, and a fellow got out there and held up his hand. Somebody says to keep going on; he says, "They are after us." Then we got out of the road a little and they tried to break the bottles. They told us to break the bottles. It was either Joe or Louis—it was from behind. I broke the bottles. Just took them in my hand and hit them together. After we got out of the road a little ways, out of the main road, we went toward a swamp

(Testimony of Charles Hunter.)

there. There was another road there. We turned off into this road. This side road went around a swamp. And then came back and turned around and went on. This road we took off to the side down the swamp was in the direction of Ronan. This was not toward the place we were going to. (Q.) How far on the traveled [27] road was that swamp, off of the main road? (A.) About two or three miles. I couldn't say who was giving directions to the car that we go down that road by the swamp. When this car came along it passed us in the same direction we were going in. They jumped out of the car; Andrew Gilbeau jumped out. He tried to stop us. He held up his hand and took out his gun and tried to shoot at the car. He started to shoot when we tried to get away. We were not then on the main road. We were just turning off when he started to shoot. I did not know who Gilbeau was at that time. There was no little wagon track where we turned off, not right there, but we got into one a few feet, about ten yards away; and between the main road and the wagon track which we got into about ten yards away the ground was just level—smooth ground. This was four or five miles toward the Mission from Ronan. Whiskey was in the bottles which I broke. They were bottles with whiskey in them.

Cross-examination by Mr. BESANCON.

I stayed at Arlee at this time. No, I am now in Washington. I lived at Arlee quite a while. I was up at Ronan for a while, too. While at Ronan or

(Testimony of Charles Hunter.)

at Arlee I was working for Joe Pablo. Not all the time—I was working for his brother Louis awhile. It is a fact that for a long time before this occurrence [28] that I have testified to that I worked for one of the Pablos, and that it was for the sister. I worked for Joe at the time I got hired from Joe Pablo's. I was hired from Joe Pablo's place. I don't remember if I had worked any before that, or not. In direct examination I said that in the fall of 1915 I lived in Arlee. I said I was at Arlee at the time. I was working for the sister up near Ronan before this. The two dollars that I said Joe gave me—it was down here by Smith's Frog Pond on Front Street. At that time Lawrence Pritchett, Joe Pablo, myself and Phil Hull were there. It was two silver dollars. From there I went to the Frog Pond with Lawrence Pritchett. Joe was not in front of the Frog Pond on West Front Street. When we came back we found him on Higgins Avenue, some place, I don't remember just where. We all got in the car down here by the corner at Schlossberg's. From there we went around by the Montana Bar; just drove down there, and somebody said stop. I don't remember who it was. I don't remember whether I said stop. We stopped, and Lawrence Pritchett and I went into the Montana Bar and we stayed there a little while. Phil Hull came along there looking up and down for me to come and go along with him. When we got out of the Montana Bar I don't remember whether Joe Pablo was still sitting in the car or not. We left him sitting in the

(Testimony of Charles Hunter.)

front seat when we got out. I don't remember whether he was there when we got back, but I think he was and facing forward. We came from the back end [29] of the car. I had whiskey. It was wrapped up in a little bundle—one bundle. I put it in the car. I guess Joe was looking at us. I know he was. He said to speed up, we would have to be going. I don't remember all that he said. Guess Phil Hull got in there when we did. That five dollars was given to me by Schlossberg's. I don't believe we were in the car just then. We were there at the corner—I and Lawrence Pritchett, Charley Stevens, Phil Hull and Joe Pablo. The whole party was there in front of Schlossberg's, and that is where he gave me the five dollars. I don't remember what time of the day that was. The car was right in front there. It was there right by the sidewalk, I don't remember just how it was now. I didn't ask Joe for this money. I don't remember of anybody asking him for it. Joe said we will have to take some out with us—some whiskey. He said whiskey and gave me this money. I am an Indian and have got land up on the reservation. I got whiskey in the saloons in town. I didn't get it at the Frog Pond. Tony Barnaby got it. I didn't say awhile ago that I went in and got it. I got this other man to go in there and get it for me. At the Montana Bar I said I went in and got it. No questions asked. I was not acquainted with the barkeeper or proprietor of the Montana Bar. I had bought liquor there before. I couldn't say how many times be-

(Testimony of Charles Hunter.)

fore. Not many times, but some time before. I said that on the way out some one picked up a bottle some two or three miles out of town here. [30] Somebody else picked it up. I don't remember who it was. I couldn't say it was Lawrence; but somebody got out and picked it up there. I don't know if I put it there myself or not. I might have, I couldn't say. I didn't tell this somebody else where to pick it up. The car stopped and he went and picked it up. That was a quart bottle of whiskey. It was hid along the fence on the right-of-way of the railroad. It had paper over it, I believe. I don't remember who told us to stop, but I remember the car stopped and somebody, I don't know who it was, went out and got this bottle of whiskey. I don't think Stevens was drunk when we left town. We picked him up right at the corner at Schlossberg's store. I didn't say that Phil Hull, the driver, drank anything on the way. I couldn't say if he drank or not anywhere on the road, but I could say that Joe Pablo drank on the road, along the road from town and down at Johnny Matt's place and all along the road between here and Arlee. They were not drinking all of the time. We stopped at Couture's place. I pulled out the bottle there and gave some to Mr. Couture. I did say that from four or five miles from Missoula I put all the bottles in the seat. That was when somebody got out to get the other bottle. I was sitting in the back seat and put the bottles in under the cushion and some in my pocket. I don't remember how much I had two pints

(Testimony of Charles Hunter.)

in my pocket. I couldn't say if anyone else had any in their pockets. They were in my pants' pocket. The rest of them were in [31] the machine. They were not wrapped up in my pocket. I put them under the seat. I put them under the seat. At Joe's place I took out those bottles and put them in the front seat. I had them right behind me, this way, I didn't take them and put them under the seat. They were not wrapped up when in the machine at this place. There was three or four quarts. They wasn't standing, they was laying down, four quarts laying down in the machine on the side where I was sitting and right behind me. I was not sitting on the bottles, they were around me. All of them were full. I *didn't Gilbeau* at that time. I didn't know who it was who stepped out there and started to shoot or said something; I didn't know it was Gilbeau. He said stop, I guess, I couldn't hear what he was saying. He threw up one hand and he didn't have a gun right away, he pulled out his gun afterwards. I couldn't say how many shots were fired. I broke the bottles, those four quarts. They were not from my pocket. There was one bottle from my pocket, a pint. I broke that also. I just took them and hit with my hands; took two at a time and hit them against each other.

Redirect Examination by Mr. MURPHY.

I don't know the man at the Montana bar that sold me the whiskey. I couldn't say now how he looked. He was the bartender, because he was behind the bar. We went a little [32] past the

(Testimony of Charles Hunter.)

Montana Bar when we stopped that morning—some forty or fifty feet.

Recross-examination by Mr. BESANCON.

Q. You have been convicted of introducing liquor on to the reservation?

By Mr. MURPHY.—I object to that as not proper recross-examination, and incompetent, and irrelevant and immaterial.

By the COURT.—Yes, it is, but I really think it ought to be allowed to be answered. Of course, this question with reference to whether a man has been convicted of a felony, that testimony is permitted in evidence so that the jury may take it into consideration, and weigh the credibility of the witness. My view is that it is better, because if it is a simple offense, why, the jury would take it into consideration in considering its credibility. If it was murder, or rape, it might have a much different effect upon the credibility of the witness. He may answer the question, whether he has been convicted of a felony, or not?

A. Yes, sir.

Redirect Examination by Mr. MURPHY.

Q. Did you plead guilty, or were you tried?

A. I plead guilty.

Witness excused. [33]

Testimony of Charles Stevens, for Plaintiff.

Whereupon CHARLES STEVENS, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MURPHY.

My name is Charles Stevens. I live at Arlee and have been living there about nine years. I know the defendant Joe Pablo. I am not a member of the Flathead tribe of Indians. I am a citizen of the United States; born in Canada. I was in Missoula in October, 1915, and saw Joe Pablo there. I left town with Joe Pablo, Phil Hull, Charlie Hunter, and the rest of the party. I think it was on the 5th of October the day we so left town. On that day I first saw Joe Pablo on the street, on Higgins Avenue. We were all together then, all those I have mentioned. I don't know the exact spot on Higgins Avenue; it was down on the street somewhere, on some corner. After we met him there we all got in the car and went on down the street, towards the depot, I think we went around there on Railroad street, the street we stopped at in town. I don't know exactly where we stopped; it was down after we passed the depot. I don't know where the Montana Bar is. I couldn't say whether there was a saloon where we stopped or not. When we stopped there Charlie Hunter and Pritchett got out of the car and went in back some place, I don't know, towards the back end of the car. They were not gone very long. When they came back they got in the car again. [34] Charlie Hunter had a parcel with him and took it in the car. Before we

(Testimony of Charles Stevens.)

met Pablo I had not been drinking. I don't drink and had not drank anything up to the time that I got out of the car at Railroad Avenue. When they got back into the car the package I think was put under the seat or in back of the seat in the back of the car. Then the car and we went on out; went out of Missoula. We stopped some place, I don't know; it was about four or five miles out of town. I guess Charlie spoke, I don't know, and the car stopped. I don't think there was anybody said to stop it. Then some of them got out of the car; I don't know who it was. I think it was Pritchett that got out of the car. He went,—I think he went back a ways, or went to one side of the road. The car was stopped when Pritchett got out. I don't know whether it was turned around, or backed up. I think it backed up. The person that got out of the car, I don't know what he did. He went to the side of the car and got something and brought it back with him. I didn't see what it was. I don't remember what it looked like. I don't know whether it was wrapped up I couldn't say that. After we left Missoula and along the road and after we got out from town we took some drinks. I guess it was whiskey. It was in a pint bottle. I don't remember how many drinks we took. I took four or five drinks anyhow, and all the other boys did. When I say all of the other boys, I mean, well, Joe Pablo, I think, and Pritchett and Hunter. I don't think Mr. Hull drank. [35] I don't think he drank any; I didn't see him. All the others that I have mentioned drank at the

(Testimony of Charles Stevens.)

time. I got out of the car at Johnny Matt's place; up on the hill there. As to my condition when I got out of the car at Johnny Matt's place, I was feeling pretty good. I was under the influence of whiskey; We were not all drinking all the way from Missoula to Johnny Matt's place. We were quite a way out of town before we drank. Along the road we had a few drinks. I stayed at Johnny Matt's place. We had four or five drinks I suppose in that time all along the road. I don't know whether there were any drinks taken at Johnny Matt's place; I don't think there was. Then I went up to Johnny Matt's house. I didn't go in there with the automobile. As to the package that was put in the car at that time, I think it was put in the back seat where we were sitting. I don't remember whether it was on top of the seat or under. I think it was under, some place in there.

Cross-examination by Mr. BESANCON.

At the place we stopped beyond the depot I stayed in the car all the time. Joe was sitting in front. I saw him there all the time. I don't remember whether Phil got out or not. I cannot just remember how many drinks we had on the way out. As I said, four or five times, I think. I do know where the bottle came from that was passed around—I think it was from Hunter. I think it was all the time from Hunter. I think he was the one that had it. [36] I could not say that I saw Joe Pablo with the liquor on that trip out. I didn't see him. Hunter took this from his pocket.

(Testimony of Charles Stevens.)

Redirect Examination by Mr. Murphy.

I saw Joe Pablo taking drinks out of the bottle—the same bottle that I drank out of. I don't know whether there were any drinks taken between Evaro and Johnny Matt's place. I don't know, that isn't very far from where I got out, about five miles, I think.

Witness excused.

Testimony of Lawrence Pritchett, for Plaintiff.

Whereupon LAWRENCE PRITCHETT, called and sworn as a witness on behalf of the Government, testified as follows:

Direct Examination by Mr. MURPHY.

My name is Lawrence Pritchett. I live at Arlee and know the defendant Joe Pablo. Have known him about three years. The first part of September, 1915, I was here in Missoula. Saw Joe Pablo here at that time. Left town on the 4th or 6th, I think—of October, I think. I left town with Joe Pablo, Charlie Hunter, Charles Stevens and Phil Hull. I first saw Joe Pablo that day walking around the streets. Phil Hull was with him and Charlie Hunter. I didn't talk with Joe Pablo just then. I met him several times on the street and we just talked. I saw Pablo give Charlie Hunter some money that day. I saw him give him [37] five dollars down here on the street. It was in front of the Montana saloon, I think. Pablo told Hunter to go buy whiskey with it. After that we walked in the saloon there and got the whiskey. I and Charlie went in the saloon and Charlie bought the whiskey there. He bought three quarts, and two

(Testimony of Lawrence Pritchett.)

pints, I think. I saw the whiskey after that. I saw it all the way until we got to Arlee. We left town about eleven o'clock. Charlie Hunter, Charles Stevens, Joe Pablo and Phil Hull were in the car at that time. After we left Missoula, I remember the car stopped about three miles the other side of Missoula. I don't know who ordered the car to stop. When the car stopped someone, I don't know who it was, got off. I did not get off. Whoever got off went to the fence, the corner, and got it and it was put in the car, there in the back seat. When Hunter got the whiskey at the Montana saloon he wrapped it up. It was put in the back end, at the back end of the back seat. It was laying right in the bottom, in the back. When we picked up the quart bottle along the road it had a paper around it and we took the paper off and put it under the back seat. Joe Pablo was sitting in the car, I think, when that was done. There were some drinks taken in that car as we went along the road. It was whiskey, and I drank some. They was all drinking. By that I mean Charles Stevens, Charlie Hunter, Philip Hull, and Joe Pablo. I don't know just which one passed the bottle. It [38] was a pint bottle. At different places along the road we took drinks. We took drinks after we passed Evaro. The first stop after passing Evaro was about six miles the other side of Evaro, at Johnny Matt's place. Charles Stevens then got out. He was feeling pretty good. The others in the car were feeling about the same. We had some drinks at that place, the bunch of them that was in the car. From there

(Testimony of Lawrence Pritchett.)

the car went to Octave Couture's place. We had another drink there. Couture's place is about a mile from Arlee, on this side of Arlee. We all took drinks there. We stayed there about twenty minutes, I guess. Couture's place is back from the road. From there the car came back to my father's place. This is about six miles this way from Mr. Couture's place. Not between Arlee and Couture's place, but this side of Arlee. I got out of the car then. I was not with the party again that day, or the next day. I was at Arlee during the month of September. I don't think I was away from Arlee around the first part of September. I saw Joe Pablo at Arlee around the 5th or 6th of September. This was in the year 1915, and all the transactions that I spoke about were in 1915. Arlee, Montana, is on the Flathead Indian Reservation. On September 5th and 6th I was down at Arlee. At that time they had a hand game down on the river, about a mile from the town of Arlee. There were about a hundred persons present, white people and Indians. I was there and went down there with Joe [39] Pablo. I just went down once I think—twice. He told me to get in the car and we would go to the hand game, and we did. This was on the 5th of February, I think,—the 5th of September or October, it was. I met him at the Chinese restaurant. Pablo told me he would take me to the hand game and we went. When we got down there we had drinks there. There were several, Henry Matt and myself. We got the drinks from Joe and drank them down there at the hand game. After-

(Testimony of Lawrence Pritchett.)

wards we came back to the Chinese restaurant; that is, myself, Henry Matt, Joe Pablo, and the Chinaman. We were traveling in Joe Pablo's automobile. When we went to the Chinaman Joe told him to give him a bottle of whiskey. I don't know if we had any more whiskey there then. The Chinaman got a quart bottle and gave it to him. I saw Joe Pablo the next day and was around with him. There was some drinking the next day around Arlee. I was with Henry Matt, Joe Pablo and Frank Kirkpatrick. We were drinking over at Blue-eyed Mary's. Her place is across the creek from Arlee, about a quarter of a mile, I guess. I don't know who had the liquor there. We were in the car when we left Arlee to go over there. In the car were Frank Kirkpatrick, Henry Matt, myself, and Joe Pablo. There was a quart bottle in the back seat of the car, I think. Joe was running the car. I didn't see anybody put the liquor in the car. There were no drinks taken along the road.

Cross-examination by Mr. BESANCON. [40]

The day we left Missoula Joe gave Hunter five dollars. He was in front of the Montana saloon, if I remember right. I think it was down west from the Northern Pacific depot. It was a five-dollar bill. As to whether Joe gave Hunter a five-dollar bill in front of Schlossberg's store when I and the rest of them were present, I don't know just what it was. I remember he gave him money. I don't remember just exactly where it was. It was on the street there somewhere. I think it was just before Hunter and I

(Testimony of Lawrence Pritchett.)

went back toward the Montana Bar. That is my recollection of it. That is all that was bought at the Montana Bar as I remember it,—three quarts and two pints. I think it was at the time that somebody went to the corner of the fence or the railroad there to get something, that the bottles were put in the machine in the back seat. I think Charlie Hunter did that. I was sitting there with him at the time. I had to get out of the machine and so did Stevens I don't know who brought the other quart and put it in the same place. I don't know just who got out of the car and went and got it; I don't remember. There was just one went and it was not me. On the way out Joe passed one bottle around and Charlie passed one around. Joe passed a pint bottle. He took it out of his pocket. We went to Couture's to look for Louis Pablo, I think.

Witness excused. [41]

Testimony of Henry Matt, for Plaintiff.

Whereupon HENRY MATT, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. MURPHY.

My name is Henry Matt. I live at Arlee, about a mile and three-quarters east from Arlee. I know Joe Pablo and have known him since he was a little boy. He is a brother-in-law of mine. Think I remember seeing Joe Pablo in Arlee last September; it was in the neighborhood of the 5th, the 5th or 6th of September, 1915. At that time I was down to the ground there, where they were playing hand game

(Testimony of Henry Matt.)

that evening, and Sunday on the 5th. Joe Pablo and Pritchett were there, and I saw Joe going around there playing with those fellows. They were playing hard and Mr. Pritchett made the statement to me. Joe was not there. Lawrence Pritchett told me something, and from there we started over to the Chink's. The Chink's place, that is the restaurant at Arlee. We started in an automobile, four of us,—Lawrence Pritchett, Ole Dennon, Joe Pablo,—there was five of us. Mong is the Chinaman. We went up to the Chinese restaurant. We went there, because it seems that they had,—that Joe Pablo asked the Chinaman if he had a quart. The Chinaman and Joe went out and came back with a quart of whiskey, I think. This we drank outside of the automobile, outside of the car, close to the automobile. I drank some of it with the others. We drank it all there. I guess I was around [42] with Joe the night after that; I went to sleep in the car and was unconscious and didn't know any more. I know where Blue-eyed Mary's place is. I think I went over there with Lawrence Pritchett and I think, Frank Kirkpatrick and Joe. I didn't see any liquor in the car at that time, because I was out of my memory. We all had a drink of whiskey at Blue-eyed Mary's, somewhere up around the stacks. I cannot recall who had the whiskey around the stacks, we was all drinking. I was pretty full, and I was out of my memory, and it was passed around among all of use there. Kirkpatrick, myself, Joe, and Lawrence Pritchett were there.

(Testimony of Henry Matt.)

Cross-examination by Mr. BESANCON.

I think I went over to Sanders with them that day. I went to sleep in the car, I think, when we went over there. I couldn't remember much about it. I was not in a condition to remember very well. When I woke up I went over to Arlee, Montana, and that is all I know and all I can state definitely.

Witness excused.

Testimony of R. J. Holland, for Plaintiff.

Whereupon R. J. Holland, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. WHEELER.

My name is R. J. Holland. I am acquainted with Joe Pablo, and have known him ten or twelve years. I remember when the hand [43] game was going on at Arlee, and saw Joe Pablo about that time. This was in front of the Haynes store. That day I went out with Pablo to the ranch of Charley Sanders. Mr. Haynes, Lawrence Pritchett, Henry Matt and Frank Kirkpatrick went out in the car at that time. After we started I saw a bottle of whiskey. Joe was driving the car, and some whiskey was drank in the car. I cannot say just who drank it. I don't remember whether Joe drank or not. I don't remember the exact date, but would imagine that it was some time in September, during the time that the hand game was going on there. I couldn't state the exact date. Joe was driving the car that day, and I would say that he had been drinking. The first time I saw the bottle it was passed from

(Testimony of R. J. Holland.)

the back seat to the front seat. I was sitting on a small seat in the back of the car. It was a quart bottle. I didn't notice the brand.

Cross-examination by Mr. BESANCON.

I think Haynes was sitting with Joe in the front seat, and I sat in a little small seat, with my arms resting on the front seat. In the big seat behind were Henry Matt, Frank Kirkpatrick, and Lawrence Pritchett. The bottle was passed from behind. I only saw it passed once.

Witness excused.

Testimony of Frank Kirkpatrick, for Plaintiff.

Whereupon FRANK KIRKPATRICK was called and sworn as a witness on behalf of the plaintiff, and testified as follows: **[44]**

Direct Examination by Mr. WHEELER.

My name is Frank Kirkpatrick. I live at Arlee, and have known the defendant three or four years. I remember when the hand game was going on in Arlee. I saw Joe then. Took a ride with him over to Sanders' place. Joe drove the car. Just before we went over there we had come over from the Chinaman's restaurant. We had our breakfast at the Chinaman's, Henry Matt, Lawrence Pritchett, Joe Pablo and I. When we came back there was a quart bottle of whiskey in the car. I didn't see who put it in there. On the way out I drank some of it. I don't know whether Joe took a drink or not, I don't remember. I don't remember the brand of whiskey.

(Testimony of Frank Kirkpatrick.)

Cross-examination by Mr. BESANCON.

I was sitting in the back seat of the car with Lawrence Pritchett and Henry Matt. I don't know who started to pass the bottle, I couldn't say. It started from the back seat. That is my recollection of it.

Witness excused.

Testimony of Lucy Kirkpatrick, for Plaintiff.

Whereupon LUCY KIRKPATRICK, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. WHEELER. [45]

My name is Lucy Kirkpatrick, wife of Frank Kirkpatrick. I am acquainted with Joe Pablo and know where Blue-eyed Mary lives. She lives across the creek from Arlee. I was at Blue-eyed Mary's place some time last September, talking with her. We moved there about the last of August. My husband stayed there too. I remember the time my husband came into Missoula. He came in with Joe Pablo, his wife, and I, the four of us. I don't remember what day of the week it was. When we got back from Missoula the next day I was at Blue-eyed Mary's and I saw Mrs. Joe Pablo there, she came there with me, and then there was my husband. He came back about 12 o'clock that night. The next day I saw Frank at the haystack, and there was three parties there with my husband. I saw them all around there at the haystacks, saw them drinking. I went around the stack afterwards, as soon as they went away, and picked up a pint bottle that was laying there. That was the day after we came back from

(Testimony of Lucy Kirkpatrick.)

Missoula with Joe and Mrs. Pablo. My husband didn't come back with us that day.

Cross-examination by Mr. BESANCON.

At Blue-eyed Mary's they were all around the haystack. That is not far from Arlee,—right across the creek, very close to the road and to the Sanders' house. I stood in the window and looked out. I was too far away and couldn't see the parties very well, but Lawrence Pritchett was close to where I [46] could see him. He took a bottle and passed it around. I didn't see where he got the bottle. I found the empty bottle there after the parties left.

Witness excused.

Testimony of Andrew Gilbeau, for Plaintiff.

Whereupon ANDREW GILBEAU, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. WHEELER.

My name is Andrew Gilbeau and am a member of the Indian police of the Indian Flathead Reservation. I have known Joe four or five years, something like that. I live at St. Ignatius. Joe Pablo lives at Ronan, lives some two or three miles from Ronan, northeast from there. I saw Joe about the 5th of October. Saw him at the Mission, as he went through in an automobile which Phil Hull was driving, and in which were Joe and Louis Pablo, Phil Hull and Charlie Hunter as far as I know. There were some women in there, but I didn't know who they were at that time. After I saw them go through

(Testimony of Andrew Gilbeau.)

the Mission I got in the machine and went after them. I had received orders to stop the car, and I followed it on toward Ronan. I caught up with them somewhere this side of Ronan, not far from Ronan, this side, and I passed them, and as I passed them I tried to stop their car, that is, I started to get off of the machine, I stood on the side and looked at them, and hollered at them to stop, and I jumped off [47] and tried to block them, and they kept on going, and Hull went over the other way and took the way off of the road, and they went around there, toward the timber, and when they got up there above aways they came back down to the main road again. I fired three shots there. Before I fired the shots I flashed by badge and tried to stop them, and I hollered to stop three or four times. They just wheeled around and started right off away from me. They went off on another road. There is a wood road there, and I—it is an old road, and I don't know what they call it. Just where they turned off there was no road. After they left this road they went into another road, and after that from the main road, up toward Ronan. Then they came back into the main road. I went after them, up towards Ronan. I came back with Mr. Ramsey. When I was going that road I saw them drinking out of bottles. When we came back we got a number of bottles there. This was after we came back. Liquor, that is, whiskey, had been in the bottles. I could tell by smelling of the bottles. These we picked up right alongside of the track, right where I seen that

(Testimony of Andrew Gilbeau.)

they were breaking the bottles. It was a pint bottle and a big bottle. I picked up parts of them and could tell there was labels on them. I picked up one bottle.

By Mr. BESANCON.—We object to the witness testifying to the labels on the bottle. I think the witness said that it looked like these pieces. The witness is not able to identify the bottle that he [48] said he picked up.

By the COURT.—He can testify with reference to them, and you can cross-examine with reference to it. They are not bound to produce them. The objection is overruled.

(Exception noted by the defendant.)

As to the kind of bottle, it was one of those pint bottles; it was a big bottle, a flask, and it had a label on. The label had never been broken off the bottle. I didn't notice what make it was. I know it was a whiskey bottle and that whiskey was written on the label.

Cross-examination by Mr. BESANCON.

I lived at St. Ignatius. I didn't speak to anyone in the party when they went by. I didn't have any chance to as they went right on by. At that time I was standing off the porch at Beckwith's store, and I didn't notice them until they past by. They spurted past and I couldn't stop them then, they were gone too far by. The side curtains were up. It was raining. I am sure I know who was in the car. I didn't know all of them that was in the car, but I knew it was Pablo's car. I could tell that they was

(Testimony of Andrew Gilbeau.)

coming out. I had a telephone that they were coming out. Mr. Yaeck, or whatever his name is, and P. G. Carlson went out with me. I am not sure if I could have caught them if they had not slowed up for some purpose. They slowed up behind a wagon and then I [49] passed them. I was then riding in the back seat. I just opened the door as they went past, stepped on the running-board, and just as I went by them I got up and stepped out and held up my hand and showed my badge, held up my hand to stop, and just as I stopped, they went over the bank. I said we went over the bank, but there is a bank each side of the road. I then shot at the car, after they went by. I tried to stop them and I fired by them at the hind wheels. I have been in the Indian service about five years, most of the time. I lay off a month or so at a time. I have not laid off very much of that time, not over two months at a time, or two or three months. After the car turned away at the place where I did the shooting I didn't follow them right then. They went on the road toward Ronan and then came back to the road, and we followed them up. I saw the Pablos throw something out of the car. I seen them when they were reaching out breaking the bottles. When we came up I stopped and picked up the pieces. We came back three or four days after, something like that, and picked up the pieces out of the bottles.

Witness excused.

Testimony of R. E. Haynes, for Plaintiff.

Whereupon R. E. HAYNES, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. WHEELER.

My name is R. E. Haynes and I am a merchant at Arlee. [50] I am acquainted with Joe Pablo. I have a ranch some place there. I remember going over to this ranch, the Charley Sanders' ranch. This was some time last September. In the car were Mr. Holland, Frank Kirkpatrick, Henry Matt, Joe Pablo, and Lawrence Pritchett. Before we got to Sanders', I don't remember just where it was, I saw some whiskey in the car. I don't remember whether it was a quart, or a pint bottle. The bottle was passed around, I couldn't testify whether anybody drank or not.

Cross-examination by Mr. BESANCON.

I was going out on a business trip with Joe Pablo and sat in the front seat with him. We were going to look at some hay that I had. A bottle was passed to me from the rear. It must have been passed from the rear. I took the bottle and nobody wanted a drink, so I handed it back over my shoulder this way.

Witness excused.

Testimony of J. W. Ramsey, for Plaintiff.

Whereupon J. W. RAMSEY, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination by Mr. WHEELER.

My name is J. W. Ramsey. I am a special officer

(Testimony of J. W. Ramsey.)

for the suppression of the liquor traffic among the Indians. I know where Charley and Octave Couture live, also where Johnny Matt lives, and [51] know where the Johnny Matt lane is. I am familiar with the interior boundaries of the Flathead Reservation on all of the roads. Johnny Matt's place, the Johnny Matt lane, Octave Couture's place, the place where the hand game was played last September, the home of Lawrence Pritchett's father, the Chinese restaurant, known as the Mong's place at Arlee, and which is the only Chinese restaurant there, are all within the exterior boundaries of the Flathead Indian Reservation.

I was at Ronan the 6th of last October, when Gilbeau came there, and I went back with him. I am familiar with the road between St. Ignatius Mission and Ronan. The entire distance of this road between those two places, also the town of Ronan, are within the exterior boundaries of the Flathead Indian Reservation. I don't know an Indian woman named Blue-eyed Mary. When I saw Gilbeau in Ronan on the 6th of October I got into an automobile with him and went *d*outh from Ronan. We went to the head of what is called the Nine Pipe Reservoir. From there we took up the road that runs east into the timber, sort of north and east, to the track of an automobile, and went around that road. I looked for some bottles, some broken bottles, and I picked up some bottles there at that time. I couldn't tell what had been in the bottles except from the paper and the labels. I know the labels that were on the

(Testimony of J. W. Ramsey.)

bottles. The main paper label was Joel B. Fraser Whiskey, and over the stop, the pieces that I had that went over the [52] stopper that had been in the bottle was a Government stamp on it, which said a hundred proof, one-fifth gallon.

Cross-examination by Mr. BESANCON.

It stated one hundred proof, one-fifth gallon. Had a couple of stamps on, and marked Joel B. Fraser.

Witness excused.

Testimony of Lawrence Pritchett, for Plaintiff (Recalled).

Whereupon LAWRENCE PRITCHETT was recalled as a witness on behalf of the plaintiff, and testified as follows:

Direct Examination by Mr. WHEELER.

I testified here a moment ago. I remember going over to the Sanders' ranch, and on the way over there was some whiskey drank. I don't know where it came from. It was in the car there at the Chinaman's when we got in. It was a quart bottle and was lying in the back end, in the back seat.

Witness excused.

Government rests.

DEFENDANT'S CASE.

Testimony of Joe Pablo, on His Own Behalf.

Whereupon JOE PABLO, called and sworn on his own behalf, testified as follows:

Direct Examination by Mr. BESANCON. [53]

I am the defendant and my name is Joseph Pablo. I am an Indian and live at Arlee. I have lived there

(Testimony of Joe Pablo.)

about a year, on some land that I bought. I have some allotted land on the Reservation near Ronan. am married and have four very young children.

I was in Arlee about the 5th of September, I believe the 5th was Sunday, and I was there on that day. My wife was with me in the machine. We went to Blue-eyed Mary's place together. The way I happened to go there, I met Lawrence Pritchett and he asked me if I wanted a drink, and I said, "If you have any I will take a drink. He then said to come over, that he had a cache over there at the creek. Then Henry Madden, Lawrence Pritchett, my wife and I drove over there. We couldn't cross the creek with the machine and we got off and crossed the foot bridge. From there we went over to the stack. Then Lawrence Pritchett went down in the brush and got a bottle. He didn't go very far, just a little ways, and brought back the bottle. Lawrence passed it to me and I took a drink and the rest all drank. Lawrence put the bottle back in his pocket, and we got around there until we emptied the bottle. Then we talked for awhile and then we got another bottle. That was a pint bottle and we emptied it and threw it away. Then, after that, we opened it and drank it, I don't know what he did with it. He produced three bottles in all. From there we went up to the hand game. From Kirkpatrick's we went back across the creek and got in the car and drove back to the river. Then we went and looked at [54] the hand game. I was not in the car while we were at the hand game, and I didn't see any

(Testimony of Joe Pablo.)

liquor there, but that day I did see some and this was after we got to the hand game. Lawrence Pritchett brought some over. He called us away down in the brush and went a little ways and got a bottle. This was a short distance away from the hand game. He passed some to me and to the others. When this was all gone I left, and went back to Arlee and came down with my wife and we came to Missoula that night and we went back again that same night. On the next day, the 6th, I was in Arlee, and went out and bought some hay that day. On the trip there was with me Henry Matt, Frank Kirkpatrick, Lawrence Pritchett, Mr. Holland, and Mr. Haynes. I wanted Holland to kind of help me out in regard to the hay and he went out to do this and for the ride. I was buying the hay from Mr. Haynes. The other three just went along for the ride. We started from the front of Mr. Haynes' store. I was sitting in the front seat with Mr. Haynes. I believe I saw some liquor or bottles on the trip. The bottle was passed and I refused it. I didn't take any. Mr. Haynes passed the bottle back to the back seat. I didn't drink at all. On that same day I came from my place to Arlee in the morning, I guess about noon, and Lawrence Pritchett asked me if I wanted a drink and I told him I would take a drink if he had it. He said he had a cache and he went to the stack and got a bottle there. On that day Henry Madden, Lawrence Pritchett and I left to go to Kirkpatrick's. [55] This was Blue-eyed Mary's place. Kirkpatrick was there. We then drank a pint. I don't

(Testimony of Joe Pablo.)

know what was done with the bottles. I never put that liquor down in the brush there. I never told anybody to put it there. I had not given anybody any money to buy liquor or put it there. I guess it was there before; I don't know anything about it. I know the Chinese Restaurant at Arlee. I had been there sometimes to get liquor. As to the witness testifying that I went down there and the Chinaman brought out a bottle, I don't remember anything at all about it.

Q. Well, now, if I had this right, the witness that mentioned it, said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right. Did you, before going to the hand game, go down to the Chinaman and get a bottle? A. I believe I did, yes.

Q. Well, just tell us about that?

A. Well, I didn't see any whiskey there.

Q. What is that?

A. I didn't see anything there at all.

Q. You didn't see anything? A. No, sir.

Q. You didn't get any? A. No, sir.

Q. Well, did you see anybody get any at that time?

[56]

By the COURT.—Did he answer you that he got a bottle of the Chinaman? Read the question to the witness.

Q. Did you, before going to the hand game, go down to the Chinaman and get a bottle before going to the hand game, did you see anybody get any whiskey at the Chinaman's?

(Testimony of Joe Pablo.)

A. No, sir. I was in Missoula on the 5th of October. The night before I kept my car at a place located next to Schlossberg's at the corner, Shoemaker's place. On that day I got out of town about 10 or 11 o'clock, I think it was.

At this point a recess was taken until 1:30 o'clock of the same day.

1:30 P. M., same day, trial resumed.

On the 5th day of October, on leaving Missoula, I got into the car in front of the Schlossberg's store. I didn't give Charlie Hunter any money to buy booze. We all got in at that point. Charlie Hunter asked me if I would give him a ride as far as Ronan. I told him I would and they all asked me to take them right out to Ronan. Charlie Hunter had not been working for me at all and was not going to work for me that I remember of. From Schlossberg's store we went to the depot, that street going down to the depot. Lawrence Pritchett asked us to stop there and we stopped. I didn't get out of the car at all. Charlie Hunter got out. I didn't know where those two men were. We stayed there [57] quite a while, then they came out. Three of them came back. Nobody said anything about starting out again, we all got in and started. I didn't see them putting anything into the car nor hear them say anything about putting anything into the car. Nothing was said about liquor or whiskey at all. I never said anything and didn't hear them say anything on way going out. We stopped about four or five miles out of town. Lawrence Pritchett asked

(Testimony of Joe Pablo.)

us to stop. He got off. I didn't notice which way he was going, nor what he was going to do. I thought he was going to do something, but I didn't watch him. He went out to the fence and I didn't see him bring anything back. We all got in again. I didn't see anything going on in the back seat. I didn't see them taking out anything from the front of the seat and putting it in the machine. We drank something on the way out, before we stopped. Lawrence Pritchett pulled out a bottle and passed it around. When the second pint was brought out we were quite a distance out, we were about a half mile passed DesMet. Nothing was passed after that. I didn't see any liquor in the car after that and didn't know there was any liquor in the car. We went right on, on the main road, until we stopped at the Matt lane. The Matt lane is about nine or ten miles from where we would have crossed the Reservation line, maybe more, I couldn't tell exactly. The Matt lane is about four miles from Arlee. The Reservation line is right near Evaro. From the Matt lane we went [58] to Couture's place. Nothing happened at the Matt lane except that we stopped there and Charley Stevens got out. No liquor was passed around. We went over to Couture's place to see if Louis was there, and they said he was gone; so we turned around and came back again. We saw Couture and his wife. I didn't see any liquor there. From there we went down to my place. We made one stop, at Mr. Pritchett's place, where Lawrence got out. I didn't see any liquor passed around there. Then we

(Testimony of Joe Pablo.)

went on to my place. Pritchett's place is about four miles from my place. At my place we had dinner, and then started again. When we left my place my wife and the three children were with me, and Charlie Hunter and Phil Hull. I was riding in the hind seat with my wife and the children. Hunter was riding in the front seat with Phil Hull. I didn't see any liquor in the car at my place. Didn't see any bottles in the front seat. From there we went to Ronan. We caught up with my brother Louis at Ravalli. He got into the car. We had the curtain down and it was raining that day when we left my place; that is, the side curtains were on and the curtain on the back also. We didn't stop at St. Ignatius. We went right on through there. After passing St. Ignatius a car passed us, but I never noticed it. I didn't know anybody was in the car until there was some shooting. I didn't tell anybody to run away from them. I didn't say anything to the driver; didn't say a word. I heard four or five shots. In the car my wife was consoling the [59] kids, they were crying and I was helping her with the kids and I didn't notice anything. I didn't see a rig ahead of us, because there was two fellows ahead of me and I couldn't see. These men obstructed the view in the front, and there was a wind shield in front and it was dirty and I couldn't see through it very well.

The wind shield was up and the curtains were down on the car. It was raining, and it was pretty muddy. I didn't hear anybody yell and say to stop. The car then went west and went to Ronan, and then

(Testimony of Joe Pablo.)

went back to—We just took the road. Then we went to my brother Louis' place and stopped there over night. The next morning I went to my mother's place. From there—they were getting ready to thresh—and I had more business in Ronan and went there, and was arrested there, right in front of the State Bank, and brought into Missoula. On that trip from my place at Arlee, right on up to my place at Ronan and my brother's place, I didn't see any liquor in that car on that trip. None whatever; no bottles of any kind. Didn't see anybody breaking any bottles and throwing them out.

Cross-examination by Mr. WHEELER.

As to the charge against me on September 5th and 6th, I was at Kirkpatrick's and Mrs. Kirkpatrick and my wife came into Missoula with me on Sunday, the 5th. It was in the afternoon, towards evening. Kirkpatrick was not with me that day in Missoula, [60] and we were not drinking in Missoula together. He did not come in with me. Mrs. Kirkpatrick and my wife were here, but he was not with me. I didn't see him at all that day. I was not down here in the garage with Kirkpatrick and I didn't see him at all that day. We went back in the evening to Arlee, and I took the women folks over to Blue-eyed Mary's and left theme there and went to the hand game and then came back and went home. Was at the hand game an hour, I guess. I didn't see Harry Pritchett down there. I was not there on the night of the 6th and didn't see Harry Pritchett down there on that night. It is not a fact that Harry Pritchett

(Testimony of Joe Pablo.)

and I took part in the hand game there the 5th or 6th. I didn't call him to one side and give him a drink of whiskey out of a pint bottle, and I didn't give him a drink out of a quart bottle. I was down at the hand game on the 5th, and stayed there about an hour, or half an hour, I guess. I was with Henry Madden and Lawrence Pritchett, and we had something to drink that night, out of a pint. I didn't see any quart bottle. I didn't have any dinner at the Chinaman's place with Henry Matt and Lawrence Pritchett. I didn't eat there at all along about that time. I just went in there and stopped there a while and went on. I didn't get a bottle of whiskey at the Chinaman's. I had not obtained whiskey there before. I didn't say this morning that I got whiskey there at the other Chinaman's.

Q. Didn't Mr. Besancon ask you this morning if you had gotten liquor there at different times? [61]

By the COURT.—Well, he did put sort of a double question to the witness, and asked him if he was not at the Chinaman's and got booze, and answered, I believe I was, I believe I did. Now, whether he was answering the first part of the question and told him he got the booze, or whether he was at the Chinaman's would be for the jury.

I didn't get any whiskey at the Chinaman's at all. I saw no whiskey there and didn't have any drink at that place. On going over to the Sanders' place there was a bottle passed from behind, but I didn't see where they got it from and didn't know it was in my car.

(Testimony of Joe Pablo.)

I went over to Blue-eyed Mary's place. Lawrence Pritchett invited us over there. I didn't ask for Frank Kirkpatrick. I knew he was there. I went out by the haystack with Kirkpatrick and Matt and Lawrence Pritchett. I don't think Henry Matt was drunk at that time. It is true that there was a quart, and also a pint, bottle of whiskey there. Lawrence Pritchett had it.

I was convicted of introducing whiskey into the Reservation before. I was sentenced, but it wasn't my whiskey at all. I pleaded guilty to it here in this court, because it was a friend of mine, and I took the punishment for it. I came in here on October 5th and was brought in by Glenn and Gilbeau, brought into this court at that time.

I didn't engage Hunter to work for me and he didn't work **[62]** for me after that, and never worked for me at all. Just before he came into town he didn't work for me, he worked for my sister. My sister lives about half a mile this side of Mud Creek, about a half a mile away from me. I first saw the boys, Pritchett and Hunter in front of Schlossberg's. I didn't talk to them on the corner of the street, didn't talk with them at all. When I first saw them they was asking me if I wouldn't give them a ride, and I told them to get in the car. I had not seen them on the street prior to that time. If I did see them I don't remember it. They got into the car, and that was the time we were going home, and drove down in front of the Montana Bar. I didn't notice the bar, but drove down that way

(Testimony of Joe Pablo.)

and Lawrence Pritchett stopped us. I didn't see any saloon there and don't know where the Montana Bar is. There may be some saloons in town that I know, but I don't pay any attention to them. When we stopped Lawrence Pritchett and Hunter got out of the car. They were gone quite a while and then Hull went to see what they were doing. I didn't send Hull after them. I was anxious to get home to go to work. I don't know where Hull went I didn't pay any attention to him, didn't watch him. I saw them get into the car, but I didn't look at them. Didn't see them come out of the saloon, nor did I see them when they came up the street. I heard them get into the car, but I didn't look at them. I was looking ahead, and didn't do this because I thought they had whiskey. After we got out of town Lawrence **[63]** Pritchett passed a bottle around. When we got down a little farther they asked me to stop. I was still in the front seat, and I didn't look around to see where they went to. Lawrence Pritchett asked to stop. I didn't see him come back from the place and don't know where he went to; I was not watching him. I didn't see him have a bottle of whiskey in his hand.

I didn't see anyone have a drink at Octave Couture's place. We didn't have a drink at the Matt lane, nor at Pritchett's. We didn't have any drink at all, nor did I see anything on the reservation. I didn't see Joe Hunter break bottles and throw them out of the car at the time Gilbeau stopped us. I didn't see any bottles, nor did I see anybody throw

(Testimony of Joe Pablo.)

anything out. I know Harry Pritchett, Lawrence's brother; have seen him a few times. I don't know where they turned off the main road going to Ronan. There was some shooting and I didn't pay any attention to what was going on. The car might have stopped when they were shooting, I couldn't say. The children were screaming when the shooting took place. There were four or five shots. I didn't hear Gilbeau say stop. I know Andrew Gilbeau, but I never talked to him very much. Never was over at his place at the Mission. I have known him, but never talked to him. He might be married to some of my relatives, but I am not sure whether he is or not.

I stated that we had some bottles of whiskey at the hand game, but not after we left the hand game. The next day we did. **[64]** That was the next day over at Blue-eyed Mary's place. I don't know where this whiskey came from. Lawrence Pritchett said he had a cache and went and took it out himself and passed the bottle around. Blue-eyed Mary's place is about a half mile, I guess, maybe not quite, maybe a quarter, from Arlee, and about a mile and a half from where the hand game was going on and about a mile from where Lawrence Pritchett lives. It is not a fact that the whiskey that was drunk at Blue-eyed Mary's place came out of my car. I didn't drink at the Chinaman's place out of a quart bottle of whiskey that we got from the Chinaman. That night I left my wife and children at Blue-eyed Mary's place. They stayed there and I went to

(Testimony of Joe Pablo.)

the hand game a while, and then came back up there and went back home. I didn't leave my people at Blue-eyed Mary's place, but took them along. The first time I was at Blue-eyed Mary's place Lawrence Pritchett was there, the first time I took my wife and family there. He got in in front of Haynes' store and rode over with us. At the time I came to Missoula with Mrs. Kirkpatrick and my wife I went over to Blue-eyed Mary's place. Lawrence went over with us on the 5th, that afternoon, and in the evening I came to town. Lawrence Pritchett was over at Blue-eyed Mary's place; it was eleven or twelve o'clock. We didn't go over to the hand game at night; we went over in daytime. Lawrence was at Blue-eyed Mary's place in the daytime. It was before we came to Missoula and then he had some whiskey there and we had some **[65]** drinks. He was with us there, there were four of us. He was in front of Haynes' store and he walked,—and he asked us whether we wanted a drink. I told him, if you got a drink I will go over across the creek and get a drink. That was about eleven or twelve o'clock and before we came to Missoula. In the party were Henry Matt, Lawrence Pritchett, Frank Kirkpatrick and myself. When we got back from Missoula Lawrence Pritchett was not over there. The only time that Lawrence was over there was before we came to Missoula and before we went down to the hand game. It was on Sunday.

Redirect Examination by Mr. BESANCON.

I was at Blue-eyed Mary's place in the daytime.

(Testimony of Joe Pablo.)

It was after the hand game that I went there. That same evening I came to Missoula with Mrs. Kirkpatrick and my wife, around about two o'clock, I guess, the same day, and went back that evening. It was on Monday, the next day that I made the trip to the Sanders' place. I was asked a while ago by the district attorney about my sister's place and how close it was to my place, and I stated about half a mile; that is, from my place to Ronan. This place is my allotment near Ronan, and my sister's place is about a half a mile from there. During all the time stated in the counts of the indictment I lived at Arlee, and had been living there about a year. When talking about the place where Lawrence Pritchett lived, [66] I meant his father's place. Lawrence lived with his father at that time and just a little ways from the town of Arlee.

Recross-examination by Mr. WHEELER.

I remember when I was up in the car on the day I was arrested. It was the 6th of September, no, October. I don't remember having a conversation with Mr. Glenn after I went downstairs; I never talked to none of them. I don't remember having made any comment to Mr. Glenn about what the Court had told me. I didn't say that the reason that the Judge had told me what he did was because he knew I was up against it again.

Witness excused.

Testimony of Mong, for Defendant.

Whereupon MONG, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

My name is Mong. I sometime live in Arlee and sometimes at my home in Dixon. Last September or October I lived I think up to Arlee. As to my running a place of business there, I got some, I had some men to put up some buildings. I knew Joe Pablo a few times, but ain't acquainted with him much. I knew him before the time you state. I am not running a restaurant there. I have no restaurant. I just stop there. I have no place there, and no business there. There was another Chinaman in business there. [67] He is John Ling and is not here now. As to seeing Joe Pablo about the 5th of September at Arlee, I couldn't say what day. I don't remember his going out to the Sanders' place, don't know anything his going to the Sanders' place. I remember the hand game and was there. I didn't then give Joe Pablo a bottle of whiskey. I *couldn't whether* he got any whiskey or not. I don't know of his getting any at the place that I mentioned. I didn't see him get any whiskey. I didn't see Joe in town at all, and didn't see him get any whiskey at all. There was no whiskey being sold or given away at this place that I have mentioned at that time; none whatever.

Cross-examination by Mr. WHEELER.

Asked if they had whiskey there at that place, will say that he didn't give me no whiskey and I didn't

(Testimony of Mong.)

give him any whiskey. I didn't see any whiskey there. It was night-time and I couldn't see whether he had any whiskey or not. He didn't tell me he had any whiskey. Joe didn't tell me he had any whiskey; he didn't tell me anything. I didn't see Henry Matt in the night-time. I saw him the next morning. I couldn't say whether he had whiskey or not, that day there. I guess that they ate there. As to whether Joe ate there, I couldn't say. They may have, but I couldn't say. As to Henry Matt eating there, I couldn't say who ate there. I ain't got no business there, just help the Chinaman there. I don't sell liquor there and never have any whiskey. As to saying [68] a little while ago that they ate there, well, it might be somebody else, I couldn't keep track of them. Somebody may have eat there; I couldn't keep track of them. I couldn't say whether Henry Matt was there or not. I might have seen him there, but didn't see him doing anything. As to whether he was sitting down at the table, I couldn't keep track of him. Joe may have had whiskey there and I not know it; I couldn't swear as to that. I don't know whether Henry Matt was drinking or not. At that time I seen him down there, but I don't know whether he was drinking or not. I didn't see him drinking, and he didn't try to throw anything at me.

Witness excused.

Testimony of Philip Hull, for Defendant.

Whereupon PHILIP HULL, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

My name is Philip Hull. I live at Ronan, and have lived there since September and October of last year. I was in Missoula about the 5th of October, last fall, driving an automobile. It was Joe Pablo's machine. I left the machine some place in town, at Shoemaker's garage, and started out from there. It was half-past ten or eleven in the morning. From there I went to in front of Schlossberg's store. Joe was with me when I left Schoemaker's. At Schlossberg's I met Hunter, Pritchett, and Charley Stevens, [69] I believe. This was in front of Schlossberg's store, and they were talking to us while we were there. They got in then. I didn't see Joe Pablo hand any money to anybody. From there we went down on the Railroad Avenue. Some one in the car told me to stop there. I don't know who it was. It was not Joe; somebody in behind. I stopped, and then Lawrence Pritchett and Charley Hunter got out of the car and went up the street. They were gone quite a little while and I went and got them. Found them in the saloon. I don't know the name of it. They were drinking at the bar. I told them to come along, that we had to go on. I walked on back ahead of them to the car. Joe was in the front seat where I had left him when

(Testimony of Philip Hull.)

I came away. The other men got in. I saw them put in a package. They brought a package out from the bar at the saloon. I don't know whether they put it in the car or not; I didn't see them. They got in with it, but I don't know whether they put it in the car. It was wrapped up. We then started out, and stopped out from Missoula about four miles, near the brickyard. Someone suggested to stop. I don't know who it was; I was going along and they wanted me to stop. Lawrence Pritchett jumped out and got a bottle that they had left there the day before. I saw the bottle the day before. I didn't see them take it there this day. I couldn't swear that he was the one that requested me to stop. Somebody in behind wanted me to stop. I didn't see them put anything into the car then. We went on. I couldn't say whether **[70]** there was any drinking in the car on the way out. I don't know; I wasn't drinking, and I didn't see them. I wouldn't drink myself, and there were no bottles being passed around. We went on to the Johnny Matt place. We didn't exactly stop there, but we slowed up the car, and Charlie Stevens got out. There was no liquor passed around at Matt's place. The next stop was at Couture's place. Mr. Couture was there, I think, and I saw Mrs. Couture about the house. There was some liquor at that place I don't know who had it and I don't know who did take it. Joe didn't take any, and I didn't see him with it. I didn't see any of them drink any of it. I was talking to Octave Couture. From there we went to

(Testimony of Philip Hull.)

Joe's home. On the way out we stopped at Holland's to let him out. There was no liquor passed around there. I don't know whether he took anything out with him or not. I didn't notice whether he took anything. We didn't stop the car, we slowed up and he stepped out. We had dinner at Joe's place, and I didn't see any liquor there. The party then went straight through from Joe's. Charley Hunter was in the front seat, with me, and one of Joe's boys. Joe and his wife and the two other children were in behind. I didn't see any liquor on the front seat when I got in. Had there been four quarts on the seat next to me in front in that car, I should say I would have seen them if there had been any there, unless there had been a blanket covered over them, I would see them. I didn't see any bottle there at all. On the road we [71], caught up with Louis, Joe's brother, at Ravalli. We went right on and didn't stop at the Mission. Beyond the Mission a car overtook us and got ahead of us and one of the men got out and pulled a gun out and started shooting. I didn't know the man and he didn't say anything that I could hear. I didn't notice him waiving his hands. He started to shoot. I turned out of the road and left the road, not for very long; took another road out and kept going. As to whether anybody in the car at that spot, right there when the man came out and started to shoot tell me to hurry on and get away from there, I will say no, not until after we got out of the road, then somebody said, there was an officer. I couldn't

(Testimony of Philip Hull.)

say who said that; I couldn't say that it was Hunter, and I don't know who said it. As to the words that were used, I couldn't say just what they were. I didn't stop. From there we went to Louis' home on Mud Creek. After passing the man that fired the shots I didn't see any bottles broke. I didn't see Hunter take two bottles and smash them together and throw them out. Didn't see anyone throw out any bottles. There was no mention of bottles of liquor. We went on home to Louis Pablo's place. I didn't see any liquor at all in the car, nor did I see any liquor in the car at all at any place from the time we left Couture's, none of any kind.

While in front of the Montana Bar, when Pritchett and Hunter got out to go back, I didn't see Joe Pablo give them any money. I was sitting with Joe at the time. There was nothing said [72] about money to buy booze; not a word. I was with Joe all that morning in Missoula. Was with him all the time from the time we reached Missoula to the time we went out. We got in the night before, and I slept with him. I didn't see him give Hunter two dollars to go to the Frog Pond to get some booze. I didn't see Hunter with Joe that morning with the party that came up in the car, not that I remember of.

Cross-examination by Mr. WHEELER.

I didn't know at the time I turned off the main road and started across the field that there was liquor in the car at that time, and I didn't testify in this court on the witness-stand that I knew there

(Testimony of Philip Hull.)

was liquor in the car. Someone told me, after I had turned off that road, that it was an officer, but no one said that they were after us. Hunter was sitting on the front seat and the little boy was sitting between us. I didn't see Hunter or anyone else reach out of that car and break bottles. A car doesn't make much noise, but the curtains were down. If that had been done I don't know whether I would have seen it, or not. The reason I turned off that road and started away out of the road was because I thought we were being held up. As to the time of the day, it was about four or five o'clock, about four o'clock, I guess. It was not about two o'clock in the afternoon. At that time we had come from [73] Joe's place and were going to Louis' place on Mud Creek. From the point where we turned off of the main road, if we had followed the main road over to Louis' place it would have taken us about an hour or an hour and a quarter. From such point to Louis' place was about twelve miles, I should think. I don't know how far it is around the other way. We didn't ride in the field, but right on the prairie, and then we ran into this old road through the grass. I saw this man step out in front and holler. I couldn't say I was looking at him at the time. If anybody jumped out in front of the car I saw him. I don't know whether he held up one hand or both hands, or not. I should say there was a team right back of us, about two or three hundred yards. We had passed them just a little before they passed us. I didn't know this was Gil-

(Testimony of Philip Hull.)

beau. I had never seen him before. I have lived on the Reservation practically all of my life, except when I went to school. I went to school there. I have not lived around the Mission since he has been there, although have been around the Mission quite a little during the last four or five years, and I mean I have never seen Gilbeau around the Mission at all. Don't know how big the Mission is. There are two or three hundred people living there.

As to the bottle of whiskey that we stopped to pick up on the way back, I think Carl Thomas had cached it there the day before.

Q. Who was with you when that was cached the day before that? **[74]**

By Mr. BESANCON.—I object to that as not proper examination.

By the COURT.—Objection overruled.

(Exception taken by the defendant.)

A. Charley Hunter, Lawrence Pritchett, Joe Pablo, and Carl Thomas.

Q. Joe Pablo? A. Yes, sir.

Q. Charley Hunter? A. Yes, sir.

Q. That is the boys that got off of the other car?

A. Yes, sir.

Q. They are the boys that got off of Louis' car?

A. I don't know whether they got off of Louis' car, or not. Charley Hunter brought it there. That day Joe Pablo was riding with me in the front seat. Carl Thomas was in the rear seat. I don't know where they put the booze. I knew it was there along the fence. I knew they had it there,

(Testimony of Philip Hull.)

because they got out. He told me what he was going to do but not Joe and me. Joe and I were riding in the front seat, but he didn't tell anybody, he just stepped out, and left it there. He might have told me he was going to leave it there. As to whether that bottle of booze was drank right up there, I don't know whether it was, or not; I didn't see it afterward. It is not a fact that Joe Pablo was with Lawrence Pritchett, Charley Stevens and Charley Hunter before they ever got into the car at all. Not that morning. **[75]** They were not standing, talking on the corner, with Charley Stevens, Hunter and Pritchett, altogether. Joe and I were in the car all the time. After I got in I didn't get out of the car. It was about half-past ten when I got into the car, and got out about eleven. Joe was not with Stevens, Hunter and Pritchett on the corner. Joe and I didn't meet Hunter, Pritchett and Stevens down there at all, at least not that I remember of. When we were going out on the car I didn't know that they stopped and drank whiskey as they went along. I don't know whether Joe had a bottle, I was driving and I didn't pay no attention to it.

Q. Didn't you state to Mr. Murphy in the United States Attorney's office that you knew that they were drinking, and passing bottles around in the car?

A. I don't believe they were drinking, I said that they were full, and Mr. Murphy will remember that.

Q. Didn't you say that they were drinking when

(Testimony of Philip Hull.)

you were driving that car along there, yesterday, down in the office.

A. I don't think I did, no, sir.

Redirect Examination by Mr. BESANCON.

I was subpoenaed here as a witness for the prosecution, and the attorneys for the Government examined me carefully yesterday, and they didn't call me this morning.

Recross-examination [76] by Mr. WHEELER.

I was also subpoenaed by the defendant. I was working for Joe at the time. I drove his car to town for him.

Witness excused.

Testimony of R. H. Yaeck, for Defendant.

Whereupon R. H. YAECK, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

My name is R. H. Yaeck. I live at Dixon, and was living there about the 5th of last October. I drove out Gilbeau on a trip that day. I don't recall the exact date, but I did take him out. P. C. Thompson was with us coming out, and going back Mr. Ramsey was with us. We went out from the Mission on towards Ronan. There was a car ahead of us, and we passed a car about five miles this side of Ronan. As we passed, Mr. Gilbeau stepped out on the running board of my car and tried to stop the car ahead. They were just passing and they wouldn't stop and kept on going towards the side

(Testimony of R. H. Yaeck.)

and climbed the embankment, and kept on towards the timber. At that time Mr. Gilbeau pulled out a pistol and started shooting. I have no recollection that Bilbeau yelled to them to stop. I think he did say something, or asked them to stop. I don't recall how many shots were fired, but I think three. I think Mr. Gilbeau made some motion to them to stop when he fired the shots, and I think he spoke about having one shot left. From there we went to [77] Ronan. We didn't follow the other car at that time, but we came back afterwards and we followed what we thought was the trail of that car. I didn't watch this car as it was going off in the distance, not very long; we might have stood there a minute or so. I didn't see any bottles being broken or thrown out from the other car. We went to Ronan, and coming back Mr. Ramsey got in with us at the first bridge this side of Ronan. I think we came back to the point where we passed the other car; I believe it was the same place. From there we followed the trail of what we imagined was the trail. I am not sure that was the trail they took. The country was new to me. I hadn't been there very many times before; I followed directions more than my own information. Gilbeau stated that was the trail and that we would follow it. I don't have any vivid recollection as to what happened on the way, but I think we stopped and examined some broken bottles. I didn't examine them, but think I did see some pieces of broken bottles, don't recollect how many.

(Testimony of R. H. Yaeck.)

Cross-examination by Mr. WHEELER.

Gilbeau got out and stood on the running-board of my car; jumped off and ran along and turned off the road. I think he ran along the side of the car and started to chase their car. I was all the time sitting in my car, driving, and I didn't get out. If he held up his hand at all I think it was while standing [78] on the running-board of my car, as it appears to me now. I haven't any positive recollection about that. When we got back to that place coming back, I didn't get out. Ramsey and Gilbeau did get out. I don't recollect that both got out, but I think Mr. Ramsey did, maybe they did. I couldn't be positive that both got out and looked for broken bottles.

Witness excused.

Testimony of P. C. Thompson, for Defendant.

Whereupon P. C. THOMPSON, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

My name is P. C. Thompson. Have lived in St. Ignatius for about nine years. I was out with Mr. Yaeck last October, but don't remember the date. Mr. Gilbeau was along in Mr. Yaeck's car. When we got out about, I should judge about a mile from where we stopped where that car went past, we passed them. First we passed a wagon, or something, and when we got out there about where our car was coming up to them I saw Mr. Gilbeau get off and get on the running-board and raise up his

(Testimony of P. C. Thompson.)

hand, as far as I remember, and then he jumped off and crawled out. I know that he started to run along with the other car and commenced shooting. The other car went on. Just then we didn't follow the other car. We went to Ronan and came back. On the way back Ramsey got in with us. We came back to the place where there had been some shooting, [79] and from there we followed up to what we thought was the track of the other car. I couldn't swear they were the tracks of the other car. It was a traveled road we followed; it was not a very well traveled road. I didn't notice that anything was picked up along there, nothing whatever.

Cross-examination by Mr. WHEELER.

I don't remember whether I got out of the car the second time when we came back. I saw Ramsey and Gilbeau both get out. I am not so sure about Gilbeau, but I believe he was out; I know Mr. Ramsey went out. If I remember right they went behind the car. As to picking up bottles, they picked up something, I don't know what they did with them. I remember something was picked up, but he didn't show it to me. When we first came along there and passed that other car, Gilbeau held up his hand. He wasn't necessarily along the side of the car, he was probably along behind it. He hollered, but when I heard him holler he was on the running board. I don't remember what he hollered. I don't know whether he hollered to Hull to stop.

Redirect Examination by Mr. BESANCON.

As to this other car, there were no side curtains

(Testimony of P. C. Thompson.)

on it at all, on our car or on Pablo's car. The curtains were down, I mean the side curtains, and I could see people in the car. Answering [80] the Court's question will say, as far as I remember they were down. I could see the driver. Cannot recollect whether that is all I could see or not, I sure must have. I cannot remember who it was, but do remember seeing the driver very well. I knew who the driver was, but don't know who else was in the car. I knew the driver was Phil Hull. I didn't see or notice any women or children.

Recross-examination by Mr. WHEELER.

When the curtains are down there are pieces of isinglass on the curtains so that I could look right through into the car.

Witness excused.

Testimony of Mrs. Joe Pablo, for Defendant.

Whereupon Mrs. JOE PABLO was called and sworn as a witness on behalf of the defendant and testified as follows:

Direct Examination by Mr. BESANCON.

My name is Mrs. Joe Pablo, and I am the wife of the defendant. I remember when my husband came to our place on the 5th of October. Charley Hunter and Phil Hull were with him. They got out and had lunch and we all started out again. As to there being any liquor in the car, I didn't see anything, didn't see any on the front seat or anywhere about the car. I went with them and the children. The curtains were all on the car when we started out.

(Testimony of Mrs. Joe Pablo.)

[81] We couldn't look out. It was raining hard when we left. We overtook Louis on the other side of Ravalli. He got into the car and went on with us. Close to the line by the Reservation there was a car that overtook and passed us, and then I heard some shooting. I couldn't tell how many shots because I was hollering; one of my little girls was half falling out and I was attending to her. I was sitting in the back seat with Joe. I didn't see anybody throw out any liquor, didn't see anything at all like that. I didn't see Hunter take out two bottles and break them nor anything of the sort, because I was busy with my children. From there we went on to Louis' place and stopped at Louis' place. I didn't see any liquor along that road anywhere after that.

Cross-examination by Mr. WHEELER.

I didn't know Mr. Gilbeau, except that I have known him since I have been here. When they turned off the road I was busy with my children. As to whether Hunter might have broken some bottles there and I not have seen it or know about it, I couldn't say, but I think that he did. I couldn't swear that he did or not, but I don't think so because there wasn't any whiskey in the car when we got in.

Redirect Examination by Mr. BESANCON.

I know Blue-eyed Mary's place. She is my grandmother. Mr. and Mrs. Kirkpatrick lived at such place. I was there about the 5th [82] of September, Mrs. Kirkpatrick, myself and my grandmother. Something happened there about liquor. There was a time that Joe, Henry, my father and Lawrence

(Testimony of Mrs. Joe Pablo.)

Pritchett came up there, but I couldn't very well see them. They went up towards the stack, and all that I could see through the window was Lawrence Pritchett handing a bottle to Joe. That is all that I remember there. I didn't go out to the hand game at all. I went to Missoula with Joe on a joy trip that Sunday, about two o'clock. Mrs. Kirkpatrick was with us. We stayed in Missoula about an hour, I think, and then went back. This was after the time I had seen Lawrence passing the bottle to Joe. There was no liquor in the car at all going out, because I never allow it in the car when I am along. Nothing was said about liquor.

Recross-examination by Mr. WHEELER.

I am the sister of Henry Matt who testified here this morning. When Henry Matt and Lawrence Pritchett came over there I saw them come up there, but they went right on towards the stack. Joe was there also. I watched them all the time and saw them have a bottle; saw Lawrence hand a bottle to Joe. He got it some place around the stack.

Witness excused.

Testimony of Mrs. Lucy Kirkpatrick, for Defendant.

Whereupon Mrs. LUCY KIRKPATRICK, called and sworn as a witness on behalf of the defendant, testified as follows: [83]

Direct Examination by Mr. BESANCON.

My name is Lucy Kirkpatrick. I made a trip to Missoula with Joe Pablo and his wife about the 5th of September. I did testify this morning about seeing Lawrence Prichett and the rest drink at the hay-

(Testimony of Mrs. Lucy Kirkpatrick.)

stack. As to who got the bottle, it looked like it was Lawrence Pritchett, he was the closest one towards the house and the nearest to me. I saw him with a bottle because he drank out of it, passed it around, and then threw it down. He was the last one that emptied the bottle. We didn't come to Missoula after that but before that, on the same day. We came to Missoula first, and then the next day this happened at the haystack. There was more than one incident at the haystack; there were four of them, I think. I don't mean there was four times I saw them but there were four men at the stack. I came in with them to Missoula and went back with them. I didn't see any liquor in the car going back, didn't see any at all, and if there was any liquor in there I wouldn't go back with them. I know Lawrence Pritchett, but not very well. My home is in Arlee; I have lived there all of my life. I don't know the general reputation of Lawrence Pritchett for truth and veracity.

Cross-examination by Mr. WHEELER.

I first came into Missoula with Joe and Mrs. Pablo in [84] the car, and then when we came back I took Mrs. Pablo over to her grandmother's, and I don't know whether it was Sunday, or what day it was, but she came with me that night. Joe said he was going home. Mrs. Pablo stayed there all that night with me. Afterwards Joe came back again. I believe it was in the morning. Then Henry Matt and Lawrence Pritchett came back with him, and that was when I saw the whiskey. As to there being any

(Testimony of Mrs. Lucy Kirkpatrick.)

whiskey in the automobile, I couldn't swear whether there was or not, because I didn't see any. Will say that Mrs. Joe Pablo and I are not very good friends. When you asked me this morning about coming to Missoula with them I didn't want to say it because I was a little nervous over it.

Redirect Examination by Mr. BESANCON.

I just made one trip with them to Missoula and have never been around them since. When we came back Joe didn't go to this place where we were camping. He didn't go there at all, but told us he was going home. We had to cross the creek over a little foot-bridge about that wide. Joe didn't cross the creek. Mrs. Pablo and I went on home.

Witness excused.

Testimony of Mrs. Octave Couture, for Defendant.

Whereupon Mrs. OCTAVE COUTURE, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON. [85]

My name is Mrs. Octave Couture, and I live about two miles east of Arlee and have lived there for about twenty-four years. I remember the 5th of October, when Joe Pablo and the party that was with him in an *automobile up* to our place. I recognized Joe Pablo, saw Phil Hull, the driver, Lawrence Pritchett and Charley Hunter. They stayed there maybe fifteen or twenty minutes. I looked out of the door to see what they were doing, and watched them for about that length of time. I didn't go out to see them. As to their being drunk or sober, they looked

(Testimony of Mrs. Octave Couture.)

as though they had been drinking, and I looked to see if they were drunk or sober. I didn't see them drink there while I was looking at them. I didn't hear any mention made there about it, and I didn't take any interest in it whatever. I know the witness Lawrence Pritchett and have known him four years, maybe a little longer, somewhere along there. As to knowing his general reputation in Arlee and the community around there, for truth and veracity, I do pretty well, and that reputation is bad.

Cross-examination by Mr. WHEELER.

I didn't see my husband take a drink out of a bottle when they drove up there. I was very busy in the kitchen, and I looked out there and saw them, but whether they were drinking whiskey or not I couldn't say. I went to see if there was any liquor because I was afraid. I didn't see any liquor. I was not [86] there very long. I was just on the steps, and I didn't go out there, because it didn't interest me at all.

Witness excused.

Testimony of Archie Grant, for Defendant.

Whereupon ARCHIE GRANT, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

I am living close to Arlee at the present time, and have lived in that community six years. I am acquainted with Lawrence Pritchett and have known him since he came there, I forgot just how long it is,

(Testimony of Archie Grant.)

several years ago. I know his reputation in that community at this time for truth and veracity, and it is bad.

Cross-examination by Mr. WHEELER.

I am friendly with Lawrence Pritchett and always speak to him. As to whether we are not on good terms, will say we are not on bad terms. It is not a fact that I have it in for Lawrence Pritchett because I thought he had been working for the Government and had made some report on me. As to my business, I have been farming there for five or six years, but I am not farming at the present time. I am living in Arlee; not with my wife.

Witness excused.

Testimony of Frank Kirkpatrick, for Defendant.

Whereupon FRANK KIRKPATRICK, called and sworn as a witness on behalf of the defendant, testified as follows. [87]

Direct Examination by Mr. BESANCON.

I live at Arlee and have lived there three years, I think. I know Lawrence Pritchett, and have known him all that time. I know his general reputation in Arlee and in that community for truth and veracity, and that reputation is bad.

Cross-examination by Mr. WHEELER.

I heard that Lawrence had been working for the Government in times past, but didn't know whether it was true, or not, I couldn't say. I have heard that he was , and it is a fact that I have been a little sore at Lawrence Pritchett. I haven't very much use for

(Testimony of Frank Kirkpatrick.)

him; he gave me a little trouble last fall, family trouble. He didn't give me some whiskey down there.

Q. You did not want to testify in this case this morning, did you? A. (No response.)

Witness excused.

Testimony of Mrs. Louis Pablo, for Defendant.

Whereupon Mrs. LOUIS PABLO, called and sworn as a witness on behalf of the defendant, testified as follows:

Direct Examination by Mr. BESANCON.

My name is Mrs. Louis Pablo. I live three and a half miles northwest of Ronan. I was home last October the 5th, and remember Joe Pablo's party coming to my place. The machine stopped [88] at our place and Louis stayed there. They went by and stopped about fifty yards from our place. As to seeing those people that evening and the rest of the day, I just saw them that evening when they got back. I didn't see any liquor at all. When they reached our place every one of them was sober.

No cross-examination.

Witness excused.

Testimony of Joe Pablo, for Defendant (Recalled).

Whereupon JOE PABLO, the defendant, was recalled in his own behalf, and testified further, as follows:

Direct Examination by Mr. BESANCON.

On the 5th of October I came into Missoula, and went out on the 5th. I didn't come into town the day

(Testimony of Joe Pablo.)

before that. I came to town about three o'clock in the afternoon. I left on the 5th, but when you ask me if I had stayed in town, will say I came in on the 4th and went home on the 5th, that is it. We came in the day before, and coming in the machine stopped out near town. I didn't notice what took place. I believe somebody got out, but I didn't pay any attention. I didn't see anybody hide a bottle there that day.

No cross-examination.

Witness excused.

The defendant rests. [89]

REBUTTAL.

Testimony of Harry Pritchett, for Plaintiff (in Rebuttal).

Whereupon HARRY PRITCHETT, called and sworn as a witness on behalf of the plaintiff in rebuttal, testified as follows:

Direct Examination by Mr. WHEELER.

My name is Harry Pritchett. I live at Arlee, and farming. My farm is about a mile from Arlee. This is my father's place. I have lived there about five years. I know the defendant Joe Pablo. I remember when the hand game was going on outside of Arlee, on the river, I saw the defendant, Joe Pablo, there. That was the 5th or 6th of September, I think, somewhere along there. I didn't have any conversation with him at that time to amount to anything. I saw him there.

Q. Well, what did you do, or what did he say to you, if anything?

(Testimony of Harry Pritchett.)

By Mr. BESANCON.—We object to that, because he has already said that he had no talk with him, about anything.

By the COURT.—His judgment of what amounted to anything may not be the same as the jurors'.

By Mr. BESANCON.—We object further upon the ground that it is not a proper impeaching question.

By the COURT.—I know, but it may serve other purposes. You can always contradict the defendant on material matters. The objection will be overruled.

Exception taken by the defendant. [90]

As to what I or Joe did and what he said to me, well, he talked to me a couple of times, maybe, and called me up and gave me a drink. The first time there was nothing much said. There was a party there, and somebody called me, I think it was Joe Pablo. I went back where the bunch was and they passed the bottle around, a pint I think it was, and so I took a drink out of it, and I walked along. As to who passed it around, Joe Pablo did, I am not sure of that point, where it started from. We did take another. As to how we came to go a second time, Joe, he called me himself and gave it to me, I mean Joe Pablo. When he called me off he passed the quart bottle to me and I took a drink out of it. This was a quart bottle of whiskey. I couldn't say for sure whether this was Sunday night, or Monday night. When he called me off the second time, I don't know for sure whether there was anybody pres-

(Testimony of Harry Pritchett.)

ent or not. After that time I saw him again, and took another drink with him after that. This was out of a quart bottle. I don't know whether it was the same bottle, or not. I don't know whether anybody stood by me as I went and took a drink, or not. The third drink was taken about half-way between the hand game and the river. That was about a hundred yards.

Cross-examination by Mr. BESANCON.

I don't mean to say that I went out there alone with Joe the last time. I don't know just who was there. As to whether [91] I can name some that were there, will say that it was dark or near dark that night, and there was a bunch standing around there. I didn't know them at all. I don't know whether they was drinking, or not. This bunch didn't follow Joe and I from the big crowd. As to whether they were there, will say, there was possibly scattered all around, people all around there, we walked past this crowd a little ways. As to whether Joe had a bottle with him when we walked out, I don't know. When he got out there he pulled out a quart bottle of whiskey. As to whether he pulled it out or somebody gave it to him first, I think somebody must have given it to him,—he pulled it out of his pocket and gave it to me. The crowd was around there close to him. As to whether my brother Lawrence was there, I couldn't remember. I don't think he was there then. He was at the hand game, I think. As to seeing any of this drinking party around there, I couldn't say for sure whether I did

(Testimony of Harry Pritchett.)

or didn't now. As to how many bottles I saw there, I saw this pint the first time, and then I got a drink out of the quart bottle twice afterwards; so I am sure I saw at least a pint and a quart. I didn't see any other bottles around there.

Witness excused.

Testimony of Frank Kirkpatrick, for Plaintiff (in Rebuttal).

Whereupon FRANK KIRKPATRICK was called and sworn as a witness on behalf of the plaintiff in rebuttal, and testified as follows:

Direct Examination [92] by Mr. WHEELER.

I don't think I was over at Blue-eyed Mary's place on Sunday morning, September 5th, 1915; I don't remember. If I was over there I would know it, but I don't believe I was there at all. It was on Monday, I think Monday morning, that I was over there with Henry Matt, Lawrence Pritchett and Joe Pablo. I went to Missoula on Sunday afternoon. It was after that time that I was over to Blue-eyed Mary's place.

No cross-examination.

By Mr. WHEELER.—The Government rests.

By Mr. BESANCON.—We wish to call Joe Pablo again for a question or two.

By the COURT.—Very well.

Testimony of Joe Pablo, in His Own Behalf (in Surrebuttal).

Whereupon JOE PABLO was called in his own behalf, in surrebuttal, and testified as follows:

Direct Examination by Mr. BESANCON.

I heard what the witness Harry Pritchett testified just now as to whether at that hand game I called Harry Pritchett away and asked him to leave the bunch of people there and give him a drink, will say that I did not. I did not give Harry Pritchett any drink from any bottle that day. I didn't have any liquor at all myself there on that day. Lawrence Pritchett had some that day. I did not give a drink to Harry Pritchett that day. [93]

Whereupon the defendant rested in surrebuttal.

Witness excused.

This was all the testimony introduced in the case, and thereupon the defendant respectfully requested the Court to give the jury the following requested instructions:

Instructions Requested by Defendant.

1. An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

2. You are instructed as a matter of law, that if you believe from the evidence that the witness Lawrence Pritchett actually committed or assisted or participated in the commission of the offense charged in the indictment, then he is an accomplice.

3. The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witness; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you.

4. Although you may find beyond a reasonable doubt that some of the persons riding in the automobile with the defendant had intoxicating liquor concealed upon or about their persons, or in a [94] covered package or packages, while off the reservation, and that the same was conveyed in this manner into the reservation; still this is not sufficient to convict the defendant unless you further find, beyond a reasonable doubt, that the defendant knew, or as a reasonable person should have known, that such liquor was thus being conveyed in his machine and in this way introduced by him into the Flathead Indian Reservation.

Filed and entered April 13, 1916.

GEO. W. SPROULE,
Clerk.

All of which the Court refused, and to which the defendant duly excepted.

Thereupon the counsel for the respective parties proceeded with the arguments to the jury, and during the argument Mr. Wheeler, United States attorney, read to the jury a portion of the testimony of Joe Pablo as transcribed by the stenographer, and which part of the testimony so read by Mr. Wheeler

was substantially the following (and as found at the top of page 91 of the transcript of evidence):

Q. Well, now, if I had this right, the witness that mentioned it, said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right, did you, before going to the hand game, go down to the Chinaman and get a bottle? [95] A. I believe I did, yes.

Whereupon Mr. Besancon objected to the reading of this part of the testimony by the district attorney unless he would also read the questions and answers following and as shown by the record.

By the COURT.—Of course, he has the right to read the testimony. He is not obliged to read it all unless his own sense of what ought to be done suggests it to him.

To which ruling of the Court the defendant then and there duly excepted.

The case was argued to the jury by respective counsel for plaintiff and defendant, and the Court then instructed the jury as follows:

Instructions of Court to Jury.

(Delivered orally by the Court.)

Gentlemen of the Jury: Remember the Court states to you the rules of law; but what is proven in a case by the evidence in the case, by the evidence is entirely for you. The indictment is not evidence. In the three counts the defendant is charged on September 5th, September 6th and on October 5th of last year of having unlawfully introduced whiskey into the Indian country,—the Flathead Indian Reservation. You might find the defendant guilty of all

of the charges or you might acquit him of all; or you might find him guilty of one, and acquit him of the other two, depending entirely upon what is your opinion, your judgment in view of the evidence. [96]

The law is that anyone who takes whiskey into the Indian country has committed an offense against a law created by Congress, and if he is convicted by a jury, he is to be punished as the law directs.

The dates in the indictment are not very material, and I think you can see that the evidence very closely fits the date set forth therein.

The defendant is presumed to be innocent, and this presumption you keep in mind until you find from the evidence that that presumption of innocence is overcome, and that the defendant is guilty beyond a reasonable doubt, then it is your duty to convict him. Keep before you also the fact that he is to be found guilty only beyond a reasonable doubt; not beyond all doubt, or any doubt, not beyond the possibility of a doubt, because it is possible to doubt anything. There is nothing capable of absolute proof except some problems of science and mathematics.

A reasonable doubt means that there is something in the evidence or something lacking from the evidence that leads you to say, after you have considered it all, that it is reasonable to doubt the guilt of the defendant, that causes you to pause and say you do not have an abiding conviction to a moral certainty that the defendant is guilty as charged; and if, after you have reviewed all of the evidence, that is your conclusion, honestly arrived at, then you have what the

law terms a reasonable doubt, and that presumption [97] of innocence demands the acquittal of the defendant. It is for the Government to prove the guilt of the defendant beyond a reasonable doubt. An accused person is never required to prove that he or she is innocent; but when you come to determine whether the Government has proven the guilt of the defendant beyond a reasonable doubt, you do not look to the Government's evidence alone, but you take it all into consideration, the evidence for the Government, and the evidence for the defendant as well, and compare it together and see where the highest degree of probability lies, what is reasonable and what is not, what in your judgment is proven what conclusion it is proper for your judgment to arrive at, and then you declare the result unhesitatingly by your verdict. You draw your conclusions, you test the credibility of the witnesses in the case, where the truth lies; you determine the credibility of the witnesses by his or her motives, by his or her interest, if any they have. You observe their demeanor upon the witness-stand, whether they appear to you to be frank in an endeavor to aid you to arrive at a correct solution of the case, or whether they appeared to be endeavoring to cover up something, or to conceal the truth. You observe whether the witnesses have contradicted themselves, whether they have a good memory, or a lapse of memory, where it is reasonable that they should forget, and whether they are contradicted by other witnesses, whether what they state now is reasonable or unreasonable, and having in view all of those things that in your judgment ought

to affect the credibility of the [98] witnesses, and you determine all of those things for yourselves. You determine for yourself whether the witnesses are telling the truth, and when the defendant takes the witness-stand himself, remember he is the defendant; that he is charged with a serious offense, and that the consequences are grave to him, if he is convicted, that he has great interest in the case, and you observe his demeanor and also take into consideration what he tells you, whether reasonable or unreasonable in view of all the other evidence; whether he is contradicted, you determine, and whether his interest prompts him to depart from the truth in order to protect himself.

It appears in this case that one of the witnesses for the Government, Hunter, and the defendant, both of them, have heretofore been convicted of this same, or a like offense. That is allowed to go into evidence solely that you might take it into consideration in determining their credibility, and if you believe it impeaches their credibility, that because of it they are not likely to tell the truth, why, it is for you to determine how far it detracts from the weight to be given to their evidence, and it is for you alone.

In this case the evidence is brief and the Court will not review it. The first charge is, with reference to the introduction of liquor at Arlee, and it is a question for you whether the defendant took it there. There is evidence tending to show that he was in possession of liquor, and gave it to some parties. There is also evidence tending to show that he did not; that is to say, there [99] are witnesses that swore he

did have it there, and witnesses, that he himself, at least, did not have it.

Now these things you keep in mind and determine where the truth lies. Lawrence Pritchett swore to you that the defendant had liquor there, whiskey, there at Arlee and gave it to him. That was in the Indian country. Now, with reference to Henry Matt, the court was a little in error in correcting counsel. Henry Matt didn't say really that this defendant gave him whiskey there. What the defendant did say was, that Henry Matt and Pritchett went to the restaurant, to the "Chinks," as he said, I suppose Matt went along, and, he says, the defendant asked the Chinaman for a quart of whiskey; then, he says, they walked off. Whether he meant that the defendant and the Chinaman walked off, or the three of them, I don't know. He says, they came back with a quart of whiskey and they drank it all up, drank it at Blue-eyed Mary's. Now, it will be for you to say what Matt meant by that. I will say, that if it is uncertain and ambiguous or there is any doubt about it, it ought to be resolved in favor of the defendant. Then you have the testimony of Lawrence Pritchett, that the defendant gave him and Matt whiskey; then you have the testimony of the other parties that they took three drinks. If you believe that the defendant had whiskey there, it is for you to infer whether he introduced it into the Indian country or not, whether he brought it there. If he brought it there, if he brought it from Missoula, he certainly introduced it [100] into the Indian country. If you find that he got it at the

Chinaman's, then the law would be that the Chinaman's place is in the Indian country. Blue-eyed Mary's place is within the Indian country. Now, the Indian country; every place in the reservation is Indian country. If a man carries liquor, get liquor into the Indian country, and somebody has already taken it there, if he carries it a substantial distance to some other part of the Indian country, he or she, of course, is introducing it into the latter part of the Indian country, and so would be introducing it into the Indian country under the law. So, if the distance from the Chinaman's to the hand game,—if the defendant got whiskey and carried it to the hand game,—is not in your judgment a sufficient distance to be considered substantial, not a distance to warrant you in finding the defendant guilty, that is an inference for you to draw, and to determine accordingly; it is for you to say whether that would be an introduction into the Indian country. With reference to liquor in the Indian country in the automobile when they were going to the Sanders ranch, this liquor was taken from the Chinaman, that is, there is evidence tending to show it,—if the defendant took it there, and did not know it was there, that is a question for you to determine. But that is not very important other than it might tend to aid you in determining whether the defendant had liquor there at all,—because he denies it. There is not proof that the Sanders ranch is in the Indian country, so we [101] cannot say that going to the Sanders ranch was introducing liquor into the country. This circumstance you can have in mind.

With reference to the other matter, taking the liquor from Missoula by way of Arlee into Ronan, and the departure from the road between Ronan and the Mission you have heard the testimony of Pritchett and Hunter, and the testimony of the defendant as to the giving of the money to Hunter. I will not recite the relations existing between Hunter and the defendant, if any there were. The defendant denies it. Hunter says that the relation of master and servant existed either before or after the taking of that liquor into the reservation. If Hunter was an accomplice of the defendant, Hunter is just as guilty as the defendant, and it is for you to determine whether he is trying to clear his own skirts or swear the defendant into it. I don't say that he has; don't intimate that at all. You observed him on the witness-stand,—that is for you to say. While the Government may prosecute men for a crime, the Government is not bound to prosecute them all, or prosecute them all at the same time. You understand the contest that is going on in society between the element breaking the law, and the element that is observing the law. You must take into consideration the fact that the Government has a right to call one party, or two parties, who have committed a crime, to testify against the other,—and that is the situation here. Hunter is possibly as guilty as the other defendant, but the Government has called him in to aid it in the prosecution. Sometimes it is as important to have the one as the [102] other; but society has the right to the statement of one against the other; and you must keep that in view. You must also

view the testimony of an accomplice with caution, see whether he is corroborated or not; see whether his statement is reasonable. That is all for you to determine.

As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice. You have heard the defendant say that he did not know that this liquor was put in the automobile, took no part in it. The law is, if this was the defendant's liquor carried on to the reservation, of course, he is guilty as charged. But if it was not his liquor, he would not be guilty unless he knew it was going to the reservation, and knew it was taken on there, and you would judge that by the facts and circumstances in the case. Certainly, if that was Hunter's liquor, and this defendant did not know anything about it, he is absolutely guiltless of that part of it, and at that particular time, on the 6th of October. But if he knew that Hunter had four or five quarts of whiskey in his auto, drinking it up on the road before they got to the reservation, why then, the natural and reasonable inference was that he knew he was going to the reservation, because he was taking Hunter along to the reservation. That is for you to determine. You have heard the testimony with reference to what happened when [103] Gilbeau stopped them. Now, the inference to be drawn from that is, that if an accused person is about to be held up by an officer, and he believes he is going

to be held up, you have the right to take it into consideration, the same as the other evidence in the case. But, if he satisfactorily explains to you, and tells you, and causes you to believe that he imagined he was going to be held up by a highwayman, why, the act of fleeing would not be a fact from which you ought to infer guilt. That is a question, whether he fled to get away, to destroy the evidence, or whether he did not have the liquor at all. That is for you to determine.

There is one other matter, character. The character of Lawrence Pritchett was impeached. Three witnesses testified in the community in which he lived that his reputation for truthfulness is bad. Now, you have that in mind, and you determine for yourselves, in view of all the evidence, what his reputation was, and how far he told the truth, and also look to that to see whether he was telling the truth. A man's reputation is a priceless possession. If it is a good reputation for truthfulness, it goes to the weight of his testimony. A bad reputation of a witness, it seems to me, ought to detract from the weight of his testimony; unless you believe that when he is put on the witness-stand, and under oath, he will tell the truth though he might lie to his neighbors, and have a reputation for untruthfulness. As I told you before, you are the exclusive judges of the credibility of the witness, and [104] the weight to be given to all of the testimony.

Gentlemen, the case is for you. When you retire to your jury-room, you will select one of your number as foreman, and proceed to a verdict. The

Court will conclude as it began, the defendant is presumed to be innocent, and unless you find from the evidence that he is guilty beyond a reasonable doubt, you will acquit him. Are there any exceptions?

By Mr. BESANCON.—May we have an exception to the failure of the Court to give defendant's proposed instructions 1 to 4, both inclusive.

By the COURT.—Very well, the instructions will be filed, and the exception will be noted.

Thereupon the jury retired, and subsequently returned into court the following verdict:

Verdict.

We, the jury in the above-entitled case, find the defendant, Joe Pablo, guilty in the manner and form as charged in the indictment on Count Three thereof, and not guilty on Counts One and Two.

H. H. MONTGOMERY,
Foreman.

And thereafter, on the 17th day of April, 1916, and before the sentence of the court, the defendant made and filed a Motion in Arrest of Judgment, which said motion is as follows: [105]

(Title of Court.)
(Title of Cause.)

Motion in Arrest of Judgment.

Now comes the defendant, Joseph Pablo, in his own proper person, the Court being about to pronounce sentence and judgment, upon the verdict of the jury returned into court in this cause, and moves the Court to arrest the judgment upon the third count of the indictment upon which this defendant

was found guilty by the jury, and assigns as reasons why the judgment should be arrested the following, to wit:

1. That the evidence was insufficient to warrant the jury in finding the defendant guilty upon the third count of the indictment.

2. That the Court erred in failing to instruct the jury to acquit the defendant upon the third count of the indictment.

3. That the evidence does not prove nor tend to prove that the defendant knowingly conveyed whiskey or other intoxicating liquor in his automobile into the Flathead Indian Reservation or from place to place within such reservation.

4. That the evidence does not prove nor tend to prove that the bottles and liquor testified as being in the automobile at certain points within the reservation was the same or parts of the same that other evidence on the part of the Government tended to prove was in the automobile when it left Missoula or in it at any [106] place while the same was off the reservation and on the same trip.

5. That the evidence does not prove nor tend to prove that any whiskey or intoxicating liquor such as described in the indictment, owned by the defendant or obtained by him, was by him knowingly introduced by him into the Flathead Indian Reservation.

JOSEPH PABLO,
Defendant.

JOHN P. SWEE,
A. BESANCON,
Attorneys for Defendant.

Service of the foregoing acknowledged and copy received this 17th day of April, 1916.

B. K. WHEELER,
United States Attorney.

Filed April 17, 1916. Geo. W. Sproule, Clerk.

This motion in arrest of judgment being submitted to the Court and urged by the defendant and on said date, to wit, April 17th, 1916, the Court ordered that said motion be, and the same was denied.

To which ruling of the Court the defendant then and there duly excepted, and his exception was noted. [107]

Thereafter, on the 17th day of April, 1916, the Court passed sentence upon the defendant and entered a judgment and order adjudging that the defendant, Joseph Pablo, be confined and imprisoned in the county jail of Missoula County, Montana, for the term of seventy-five days and that he pay a fine of one hundred dollars and costs, and that the usual order be made relative to such fine and costs; and to which judgment and sentence of the court the defendant then and there duly excepted.

Thereafter and at the time stated herein, the defendant interposed a motion for new trial, the same being in words and figures following, to wit:

(Title of Court.)
(Title of Cause.)

Motion for New Trial.

Comes now the defendant, Joseph Pablo, and moves the court to set aside the verdict of the jury

finding him guilty on the third count of the indictment against him and to grant him a new trial herein, for the following reasons, to wit:

1. That the evidence is insufficient to warrant the jury in finding the defendant guilty on the third count of the indictment.

2. That the Court erred in failing to instruct the jury to acquit the defendant.

3. That the verdict is contrary to law and the evidence. [108]

4. That the jury, after this cause had been submitted to them and after retiring to deliberate upon their verdict, separated and disbanded and spent a large part of the night separate and apart from one another, and this before they had agreed upon a verdict and without leave of the Court and contrary to the express directions of the court, and after having so disbanded and separated again in the morning assembled together and then reached and agreed on the verdict submitted.

5. That the Court erred in refusing to give the defendant's instructions numbered 1 to 4, both inclusive, and as requested by him in writing.

6. The Court erred in holding that the evidence was sufficient to warrant the jury in finding the defendant guilty.

7. The Court erred in overruling the defendant's motion to arrest judgment.

8. The Court erred in passing sentence upon the defendant.

9. Errors in law occurring at and during the pro-

ceedings of the trial and excepted to by the defendant.

Said motion is based upon all the papers, pleadings and files herein, upon affidavits to be filed before the hearing of this motion for a new trial, and upon a bill of exceptions to be served and filed for allowance within the time allowed by the court.

Dated April 17th, 1916. [109]

A. BESANCON,
JOHN P. SWEE,
Attorneys for Defendant.

Service of the foregoing Motion for New Trial and receipt of copy accepted this 17th day of April, 1916.

B. K. WHEELER,
United States Attorney.
By FRANK WOODY,
Assistant.

Filed April 17th, 1916. Geo. W. Sproule, Clerk.

On the same day, to wit, April 17, 1916, on the filing of a written stipulation by and between the United States attorney and the attorneys for the defendant and requesting the Court therefor, the Court granted the defendant thirty days additional to the statutory time in which to prepare, serve and file for allowance a bill of exceptions in this case.

Order Settling and Allowing Bill of Exceptions.

AND NOW, in furtherance of justice and that right may be done, the defendant, Joseph Pablo, tenders and presents the foregoing as his Bill of Exceptions in this case to the action of the Court, and prays that the same may be settled and allowed

and signed and sealed by the Court and made a part of the record; and **[110]** the same is accordingly done this the 30 day of June, 1916.

BOURQUIN,
District Judge.

Service of the foregoing Bill of Exceptions acknowledged and copy received this 25 day of May, 1916.

B. K. WHEELER,
United States District Attorney.
By FRANK WOODY.

Received by the clerk for delivery to the court this 25 day of May, 1916.

GEO. W. SPROULE,
Clerk United States District Court.
By Harry H. Walker,
Deputy.

Filed this 30th day of June, 1916. Geo. W. Sproule, Clerk United States District Court. **[111]**

Thereafter, on October 2, 1916, Defendant's Assignment of Errors was duly filed herein, in the words and figures following, to wit: **[112]**

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH PABLO,
Defendant.

Assignment of Errors.

The defendant in this action, in connection with his petition for a writ of error, and after the denial of his motion for a new trial, specifies and makes the following assignments of error, which he avers exist.

1. The Court erred in admitting certain evidence over the defendant's objections thereto and excluding certain evidence excepted to by the defendant at the time of the trial, as follows, to wit:

2. The Court erred in allowing the witness Charles Hunter to testify, and in overruling the objections of the defendant on the ground that said Hunter had been convicted of a felony and in accepting the telegram as evidence that said witness had been pardoned and restored to citizenship.

3. The Court erred in allowing the witness Andrew Gilbeau to testify relative to the kind of bottles which he picked up and the particular labels upon the same and this without requiring the said witness to produce the said bottles and labels or account for them.

4. The Court erred in allowing the following question to be asked of the witness Philip Hull and answered on cross-examination:

> Q. Who was with you when that was cached the day before that?

5. The Court erred in allowing the following question to be asked the witness Harry Pritchett and answered:

> Q. Well, what did you do or what did he say to you, if anything? **[113]**

6. The Court erred in permitting the United States attorney in his argument to the jury to read to them a portion of the testimony of Joe Pablo as transcribed by the stenographer, and which part of the testimony so read by said attorney was substantially the following:

> Q. Well, now, if I had this right, the witness that mentioned it said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right. Did you, before going to the hand game, go down to the Chinaman and get a bottle?
>
> A. I believe I did, yes.

And this without requesting said district attorney to read the questions and answers following the above and of said witness and as shown by the record.

7. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

8. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

You are instructed as a matter of law, that if you believe from the evidence that the witness Lawrence Pritchett actually committed or assisted or participated in the commission of the offense charged in the indictment, then he is an accomplice.

9. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witness; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you.

10. The Court erred in refusing to give to the jury the following instruction requested by the defendant: **[114]**

Although you may find beyond a reasonable doubt that some of the persons riding in the automobile with the defendant had intoxicating liquor concealed upon or about their persons, or in a covered package or packages, while off the reservation, and that the same was conveyed in this manner into the reservation; still this not sufficient to convict the defendant unless you further find, beyond a reasonable doubt, that the defendant knew, or as a reasonable person should have known, that such liquor was thus being conveyed in his machine and in this way introduced by him into the Flathead Indian Reservation.

11. In connection with the Court's refusal to give the defendant's proposed instructions relative to the witness Lawrence Pritchett being an accomplice, the Court further erred in instructing the jury, in re-

gard to said witness Lawrence Pritchett, in the following language, to wit:

> "As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice."

12. The Court erred in holding the evidence sufficient to warrant the jury in finding the defendant guilty.

13. The Court erred in denying the motion of the defendant in arrest of judgment.

14. The Court erred in passing sentence upon the defendant.

15. The Court erred in overruling the defendant's motion for a new trial.

Dated July 7th, 1916.

JOHN P. SWEE,
(By A. B.)
A. BESANCON,
Attorneys for Defendant.

In the District Court of the United States, for the District of Montana. No. ——. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Assignments of Error. Filed June ——, 1916. ————, Clerk. Albert Besancon and John P. Swee, Attorneys for Defendant. Filed Oct. 2, 1916. Geo. W. Sproule, Clerk. **[115]**

Thereafter, on Oct. 2, 1916, defendant filed his Petition for Writ of Error herein, in the words and figures following, to wit: **[116]**

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

Petition for Writ of Error.

Now comes the defendant, Joseph Pablo, and petitions this Court for a writ of error herein, and says:

That on or about the 17th day of April, 1916, the above-named court entered a judgment herein against the defendant, wherein and whereby the defendant was sentenced to be confined and imprisoned in the county jail of Missoula County, Montana, for a term of seventy-five days and to pay a fine of One Hundred Dollars, and costs taxed at $294.10, for the alleged offense of introducing a large quantity of spirituous and intoxicating liquor into the Flathead Indian Reservation within the State of Montana and district of Montana. That in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which more fully and in detail appear from and in the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, will be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

Dated July 8th, 1916.

JOHN P. SWEE and
A. BESANCON,
Attorneys for Defendant.

In the District Court of the United States for the District of Montana, No. 2732. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Petition for Writ of Error. Filed Oct. 2d, 1916. Geo. W. Sproule, Clerk. Albert Besancon and John P. Swee, Attorneys for Defendant. **[117]**

Thereafter, on October 2, 1916, an Order Allowing Writ of Error was duly filed and entered herein, in the words and figures following, to wit: **[118]**

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

Order Allowing Writ of Error.

On this 2d day of October, 1916, comes the defendant, Joseph Pablo, by his attorney and files herein and presents to the court his petition praying for the allowance of a writ of error and his assignment of errors intended to be urged by them and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be presented in the United States Circuit Court of Appeals, Ninth Circuit, and such other and further proceedings may be had as are proper in the premises.

In consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of five hundred dollars ($500.00), which will operate as a supersedeas bond.

GEO. M. BOURQUIN,
District Judge.

In the District Court of the United States for the District of Montana. No. 2732. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Order Allowing Writ of Error. Filed and entered Oct. 2, 1916. Geo. W. Sproule, Clerk. Albert Besancon and John P. Swee, Attorneys for Defendant.

[119]

Thereafter, on October 5, 1916, a Bond on Writ of Error was filed herein, in the words and figures following, to wit:

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

Appearance Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Joseph Pablo as principal, and Andrew J. Brower and Addison M. Sterling, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Five Hundred Dollars ($500), to be paid to the said United States of America; to which payment, well and truly to be made, we bind ourselves, our and each of our executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of Oct. in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at the term held in April, 1916, of the District Court of the United States for the District of Montana, in a suit pending in said court between the United States of America, plaintiff, and Joseph Pablo, defendant, a judgment and sentence was rendered against the said Joseph Pablo; and

said Joseph Pablo has obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit and a Citation directed to the United States of America citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at the city of San Francisco, California, sixty days from and after the date of said citation, and which citation has been duly served: [120]

Now, the condition of the above obligation is such that if the said Joseph Pablo shall appear in the United States Circuit Court of Appeals for the Ninth Circuit on the first day of the next term thereof to be held at the city of San Francisco, within sixty days from the 5th day of October, 1916, and from day to day thereafter during said term and from term to term and from time to time, until finally discharged therefrom, and shall abide and obey all orders made by the said United States Circuit Court of Appeals for the Ninth Circuit in said cause and shall surrender himself in execution of the judgment and sentence appealed from as said Court may direct if the judgment and sentence of the said District Court against him shall be affirmed by such Circuit Court of Appeals for the Ninth Circuit, then the obligation to be void; else to remain in full force, virtue and effect.

JOE PABLO. (Seal)
ANDREW J. BROWER. (Seal)
ADDISON M. STERLING. (Seal)

State of Montana,
County of Missoula,—ss.

Andrew J. Brower and Addison M. Sterling, being duly sworn, each for himself says: that he is a resident of the county of Missoula and State of Montana and is a householder and freeholder therein, and that he is worth double the amount stated in the foregoing bond, in property in said State, over and above all his debts and liabilities and exclusive of property exempt by law from execution in the State of Montana.

ANDREW J. BROWER,
ADDISON M. STERLING.

Subscribed and sworn to before me this 3d day of October, 1916.

[Seal] JOHN P. SWEE,
Notary Public for the State of Montana, Residing at Ronan, Montana.

My commission expires Dec. 19th, 1917.

Approved Oct. 5th, 1916.

BOURQUIN,

Judge U. S. Dist. Ct. for the District of Montana.

Filed Oct. 5, 1916. Geo. W. Sproule, Clerk. [121]

Thereafter, on the 5th day of October, 1916, a Writ of Error was duly issued herein, which said writ is hereto attached and is in the words and figures following, to wit: [122]

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

Writ of Error.

The United States of America,—ss.

The President of the United States of America, to the Judge of the District Court of the United States for the District of Montana, GREETINGS:

Because of the records and proceedings and also of the rendition of judgment and the sentence of the Court wherein the defendant, Joseph Pablo, was sentenced to be imprisoned in the county jail of Missoula County, Montana, and at Missoula, Montana, for a period of seventy-five days and to pay a fine of One Hundred Dollars and costs, for the crime charged of introducing a large quantity of spirituous and intoxicating liquor, commonly called whiskey, into the Flathead Indian reservation within the State and District of Montana and in violation of the statutes of the United States so made and provided, a manifest error has happened to the great

damage of said Joseph Pablo, as appears from the papers herein, we being willing that the error, if any has been committed, should be duly corrected and full and speedy justice done to the defendant aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you may have the same at the city of San Francisco, State of California, *on the* thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, that the record and proceedings aforesaid may be inspected and the said Circuit Court of Appeals may cause further to be done to correct that error what of right [123] and according to law and custom of the United States should be done.

Witness the Hon. EDWARD D. WHITE, Chief Justice of the United States, this 5th day of October, in the year of our Lord one thousand nine hundred sixteen and of the independence of the United States the one hundred and forty-first.

[Seal] GEO. W. SPROULE,
Clerk of the District Court of the United States for the District of Montana.

The above writ of error is hereby allowed by ————, District Judge.

GEO. M. BOURQUIN.

Due service of the above writ admitted and copy received at Helena, Montana, Oct. 5, 1916.

BURTON K. WHEELER,
United States Attorney for the District of Montana.

Answer of Court to Writ of Error.

The answer of the Hon. GEO. M. BOURQUIN, the United States District Judge for the District of Montana, to the foregoing writ:

The record and proceedings whereof mention is made, with all things touching the same, I certify under the seal of the said District Court to the Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] GEO. W. SPROULE,
Clerk of the District Court of the United States for the District of Montana.

By C. R. Garlow,
Deputy,

No. 2732. In the District Court of the United States for the District of Montana. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Writ of Error. Filed July ——, 1916. ————, Clerk. [124]

[Endorsed]: No. 2732. In the District Court of the United States, for the District of Montana. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Writ of Error and Answer of Court to Same. Filed October 5, 1916. Geo. W. Sproule, Clerk. [125]

Thereafter, on October 5, 1916, a Citation was duly issued herein, which said Citation is hereto attached and is in the words and figures following, to wit: [126]

In the District Court of the United States, for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH PABLO,

Defendant.

Citation on Writ of Error.

The United States of America,—ss.

To Hon. T. W. GREGORY, Attorney General of the United States, and to B. K. WHEELER, United States District Attorney for the District of Montana, and to the United States of America:

YOU ARE HEREBY NOTIFIED AND ADMONISHED to be and appear at the Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, State of California, thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office in the District Court of the United States for the District of Montana, wherein the United States of America is plaintiff and Joseph Pablo is defendant, to show cause then and there why judgment and sentence of the Court rendered against said defendant as in such writ of error mentioned should not be corrected and speedy justice be

done to the defendant Joseph Pablo in that behalf.

Given under my hand in the City of Helena in the District of Montana above named this the 5th day of Oct., A. D. 1916.

BOURQUIN,
Judge of the District Court of the United States for the District of Montana.

Due service of the above-named citation is hereby admitted as also the receipt of a copy thereof, at Helena, Montana, Oct. 5, 1916.

BURTON K. WHEELER,
United States Attorney, District of Montana. [127]

[Endorsed]: No. 2732. In the District Court of the United States, for the District of Montana. United States of America, Plaintiff, vs. Joseph Pablo, Defendant. Citation. Filed Oct. 5, 1916. Geo. W. Sproule, Clerk. [128]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 129 pages, numbered consecutively from 1 to 129, inclusive, is a full, true and correct transcript of the pleadings, process, orders, verdict and judgment, and all other proceedings had in said cause, and of

the whole thereof, as appears from the original records and files of said court in my custody as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original Writ of Error and Citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Forty-five and 55/100 Dollars, and have been paid by plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, at Helena, Montana, this 20th day of October, A. D. 1916.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy. [129]

[Endorsed]: No. 2873. United States Circuit Court of Appeals for the Ninth Circuit. Joseph Pablo, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Montana.

Filed November 3, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

No. 2873.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

February Term, 1917.

JOSEPH PABLO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Montana.

Brief on Behalf of Plaintiff in Error

ALBERT BESANCON, of Missoula, Montana,

and

JOHN P. SWEE, of Ronan, Montana,

Attorneys for Plaintiff in Error.

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JAN
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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

February Term, 1917.

JOSEPH PABLO,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Upon Writ of Error to the United States District Court of the District of Montana.

Brief on Behalf of Plaintiff in Error

STATEMENT OF THE CASE.

The plaintiff in error, Joseph Pablo, was indicted by the United States grand jury for the District of Montana by an indictment containing three counts, each charging him with having, at the time stated, introduced intoxicating liquors upon the Flathead Indian Reservation in Montana; the first count being for about one quart of whiskey and on September 6th, 1915, the second count for about three quarts of whiskey on September 5th, 1915, and the third count for about four quarts of whiskey on October 5th, 1915.

To this indictment the defendant below entered a plea of not guilty, and the case came on regularly for trial before a jury on April 14th, 1916, at Missoula, Montana, the plaintiff and defendant below being represented by the counsel whose names now appear as the attorneys of record in this case.

Whereupon, testimony was introduced by and on behalf of the then plaintiff and defendant, and during the progress of the trial the defendant interposed various objections to evidence given and offered and took exception to various rulings of the court thereon and objected and took exception to other acts and omissions of the court, all of which will appear hereafter in this brief, and the questions involved and the manner in which they were raised and on which the plaintiff in error relies for a reversal of his conviction will be presented in

this statement of the case in the same numbered order as noted in the assignment of errors, also contained herein, and being as follows, to-wit:

I.

The plaintiff in error renews and again urges his general objection to the court's rulings in admitting and excluding evidence and as stated in the first, being the general specification of his assignments of error.

II.

The very first witness called by the plaintiff below was one Charles Hunter, and we here quote in full the proceedings that took place at that time and as appears by Tr. pp. 15-16:

"CHARLES HUNTER, being called as a witness, and being about to be sworn on behalf of the plaintiff, Mr. Besancon stated:

At this time we object to the witness being sworn to testify in this case upon the ground that he is incompetent to testify, having been convicted in this court of a felony, and judgment having been passed upon him in the month of February, 1914.

By Mr. Murphy: If the Court please, I have here a telegram pardoning the witness, and restoring him to citizenship.

By the Court: Well, they seem to have met the situation, Mr. Besancon.

By Mr. Besancon: Of course, we cannot question the telegram, but still we object to its being

received as evidence until the pardon itself is produced.*

By the Court: The pardon is an act of the executive of the United States, and when it is brought into this court, it is entitled to judicial notice without any proof at all. Of course, when it said the President has done a certain act, the Court must take notice of it. I think the telegram satisfies the Court, that it is so at this time. The objection will be overruled.

Exception taken by the defendant.

By the Court: As a matter of course, if there was any mistake, why, it would always be cause for setting aside a verdict, should there be one, or of any judgment; so no harm can be done in proceeding.

Thereupon CHARLES HUNTER was sworn as a witness on behalf of the Government, and testified as follows:

DIRECT EXAMINATION—BY MR. MURPHY.

*It was stated by the District Attorney that the telegram was from the Department of Justice that the President had pardoned the witness, Hunter, and the Court read the telegram.—B."

The examination of said Charles Hunter being allowed to proceed and, as will appear by Tr. pp. 17-26, said Hunter gave damaging testimony against the plaintiff in error, and the decisions of the court on the objections there made are here urged as error.

III.

On Tr. pp. 40 and 41 we find the testimony of one Andrew Gilbeau, a witness for the then plaintiff. After describing the course and direction taken by the defendant and those with the defendant such witness testified as follows:

> "When I was going that road I saw them drinking out of bottles. When we came back we got a number of bottles there. This was after we came back. Liquor, that is, whiskey, had been in the bottles. I could tell by smelling of the bottles. These we picked up right alongside of the track, right where I seen that they were breaking the bottles. It was a pint bottle and a big bottle. I picked up parts of them and could tell there was labels on them. I picked up one bottle."

By Mr. Besancon: We object to the witness testifying to the labels on the bottle. I think the witness said it looked like these pieces. The witness is not able to identify the bottle that he said he picked up.

By the Court: He can testify with reference to them, and you can cross-examine with reference to it. They are not bound to produce them. The objection is overruled.

(Exception noted by the defendant.)

The witness then proceeded to testify as to the label upon the bottle that he picked up, and further testified:

"I know it was a whiskey bottle and that whiskey was written on the label."

It being urged as error to allow this witness to testify as to the marks or labels upon the bottle and the writings upon such labels without making him produce the bottle or account for its absence.

IV.

As to the objections made and exceptions taken as found on Tr. p. 66, and being the foundation for the fourth assignment of error, although counsel for plaintiff in error believe there is merit to their position, still they are convinced that such errors, if any, there appearing are not sufficient grounds for the setting aside or reversing the judgment of conviction in this case and will not urge the same in this brief.

V.

On Tr. pp. 80 and 81 is found the testimony of one Harry Pritchett, a witness for the plaintiff in rebuttal. Such witness, after stating that he had seen the defendant, Joe Pablo, on the 5th or 6th of September at the hand game, near Arlee, further stated:

> "I didn't have any conversation with him at that time to amount to anything. I saw him there."

Q.—Well, what did you do, or what did he say to you, if anything?

By MR. BESANCON—We object to that, be-

cause he has already said that he had no talk with him, about anything.

By the COURT—His judgment of what amounted to anything may not be the same as the jurors'.

By MR. BESANCON—We object further upon the ground that it is not a proper impeaching question.

By the COURT—I know, but it may serve other purposes. You can always contradict the defendant on material matters. The objection will be overruled.

(Exception taken by the defendant.)

The witness then proceeded to testify as to remarks and statements made to him by the then defendant and to certain acts of the defendant. It will be noted that the defendant had never been examined relative to any conversation he may have had with such witness nor any meeting with such witness, and consequently these questions asked of the witness, Harry Pritchett, and the testimony obtained from him was absolutely new and the bringing out of new matter having no connection with nor bearing upon any testimony given, either by the defendant or by any of his witnesses.

VI.

On Tr. pp. 85 and 86 we find the following, which is here quoted in full:

Thereupon the counsel for the respective parties proceeded with the arguments to the jury, and during the argument Mr. Wheeler, United

States attorney, read to the jury a portion of the testimony of Joe Pablo as transcribed by the stenographer, and which part of the testimony so read by Mr. Wheeler was substantially the following (and as found at the top of page 91 of the transcript of evidence):

Q.—Well, now, if I had this right, the witness that mentioned it, said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right, did you, before going to the hand game, go down to the Chinaman and get a bottle? A.—I believe I did, yes.

Whereupon Mr. Besancon objected to the reading of this part of the testimony by the district attorney unless he would also read the questions and answers following and as shown by the record.

By the COURT—Of course, he has the right to read the testimony. He is not obliged to read it all unless his own sense of what ought to be done suggests it to him.

To which ruling of the Court the defendant then and there duly excepted."

The above questions and answers being found in full in the testimony of the defendant on Tr. pp. 48 and 49, and we here quote the same in full, just as it appears in the record:

"Q. Well, now, if I had this right, the witness that mentioned it, said that he thought that that was the time, just before you went to the hand

game; isn't that it? Before, if I got it right. Did you, before going to the hand game, go down to the Chinaman and get a bottle? A. I believe I did, yes.

Q. Well, just tell us about that?

A. Well, I didn't see any whiskey there.

Q. What is that?

A. I didn't see anything there at all.

Q. You didn't see anything? A. No, sir.

Q. You didn't get any? A. No, sir.

Q. Well, did you see anybody get any at that time?

By the COURT—Did he answer you that he got a bottle of the Chinaman? Read the question to the witness.

Q. Did you, before going to the hand game, go down to the Chinaman and get a bottle before going to the hand game, did you see anybody get any whiskey at the Chinaman's?

A. No, sir."

We again call attention to the testimony of the defendant when being cross-examined by Mr. Wheeler and as found in Tr. p. 53, which is here quoted in full:

"I didn't get a bottle of whiskey at the Chinaman's. I had not obtained whiskey there before. I didn't say this morning that I got whiskey there at the other Chinaman's.

Q. Didn't Mr. Besancon ask you this morning if you had gotten liquor there at different times?

By the Court—Well, he did put sort of a double question to the witness, and asked him if he was not at the Chinaman's and got booze, and answered, I believe I was, I believe I did. Now, whether he was answering the first part of the question and told him he got the booze, or whether he was at the Chinaman's would be for the jury.

"I didn't get any whiskey at the Chinaman's at all. I saw no whiskey there and didn't have any drink at that place."

It will be noted from the above that such part of the testimony read to the jury by the district attorney when standing alone appeared to be an admission of guilt on the part of the defendant, which was intended to prejudice the minds of the jurors against the defendant and in showing to them conclusions from the testimony of the defendant that he admitted obtaining a bottle of liquor in the Chinaman's place just before starting on the automobile trip, while in fact all of the testimony of the defendant on such point was to the effect that he had not obtained any liquor there and had seen none there, etc.

The objections and exceptions there taken by the then defendant are here renewed, and it is here urged that such misconduct on the part of the prosecuting attorney was very prejudicial to the defendant.

VII

The then defendant requested the court to give

the jury four instructions, being found in Tr. pp. 84, 85.

Instruction numbered 1 requested by the defendant was as follows:

1. An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

This instruction was refused by the court, to which the defendant duly excepted, and such refusal is here urged as error.

VIII.

The defendant also requested the court to give his instructions numbered 2, found on Tr. p. 84.

Instruction numbered 2 so requested by defendant was as follows:

You are instructed as a matter of law, that if you believe from the evidence that the witness, Lawrence Pritchett, actually committed or assisted or participated in the commission of the offense charged in the indictment, then he is an accomplice.

This instruction was refused by the court, to which the defendant duly excepted, and here urges that such refusal was error.

IX.

The then defendant also requested the court to give the jury his instruction numbered 3, found on Tr. p. 85.

Said instruction numbered 3 so requested by the defendant was as follows:

The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witnesses; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you.

This instruction was by the court refused, to which the defendant duly excepted, and such refusal is here urged as error.

X.

The then defendant also requested the court to give the jury his instruction numbered 4, found on Tr. p. 85.

Said instruction numbered 4 so requested by the defendant was as follows:

Although you may find beyond a reasonable doubt that some of the persons riding in the automobile with the defendant had intoxicating liquor concealed upon or about their persons, or in a covered package or packages, while off the reservation, and that the same was conveyed in this manner into the reservation; still, this is not sufficient to convict the defendant unless you further find, beyond a reasonable doubt, that the defendant knew, or as a reasonable person should have known, that such liquor was thus being conveyed in his machine and

in this way introduced by him into the Flathead Indian Reservation.

Said instruction was by the court refused, to which the defendant duly excepted, and such refusal is here urged as error.

XI.

It will be noted that after the refusal of the court to give the defendant's requested instructions 1, 2 and 3, bearing on accomplices, their testimony, and the fact that the witness, Lawrence Pritchett, was an accomplice, the court then, in its instruction (Tr. p. 93) instructed the jury as follows:

As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice.

Counsel for the defendant excepted to the failure of the court to give the defendant's proposed instructions 1 to 4, and we believe in so doing properly excepted to the above court's instruction, which has the opposite effect to that which was requested and as will be pointed out in the argument hereafter. The witness, Lawrence Pritchett, was an accomplice and the defendant was not only entitled to an instruction to that effect, but certainly the giving of an instruction to the effect that Pritchett was not an accomplice is error and very prejudicial to the defendant.

The jury found the defendant guilty in the man-

ner and form as charged in Count 3 of the indictment and not guilty as to Counts 1 and 2. (Tr. p. 8.)

The plaintiff in error, Joseph Pablo, appeared in court in his own proper person and by his counsel, the court being about to pronounce sentence and judgment upon the defendant, and moved the court to arrest the judgment and assigned five reasons therefor in his written motion in arrest of judgment. (Tr. pp. 95, 96.)

The motion in arrest of judgment was denied, to which ruling of the court the defendant then and there duly excepted, and the court then sentenced the defendant to imprisonment in the county jail of Missoula County, Montana, for the term of seventy-five days and to pay a fine of $100 and costs, which costs were taxed at $294.10, and that he be confined in said county jail until said fine and costs were paid or otherwise discharged according to law, and judgment was duly entered thereon (Tr. pp. 9, 10), to which judgment and sentence the defendant then and there duly excepted.

Thereupon the defendant interposed a motion for a new trial, setting up nine grounds of error (Tr., pp. 97 to 98) and after the hearing thereon the motion for new trial was by the court overruled, to which the defendant duly excepted.

A bill of exceptions was prepared, allowed, settled and signed, which is set forth in the transcript in this case. (Tr. pp. 11 to 100 inclusive.)

Whereupon the defendant below sued out a writ of error to this court and specified the following:

ASSIGNMENTS OF ERROR.

The defendant in this action, in connection with his petition for a writ of error, and after the denial of his motion for a new trial, specifies and makes the following assignments of error, which he avers exist:

1. The Court erred in admitting certain evidence over the defendant's objections thereto and excluding certain evidence excepted to by the defendant at the time of the trial, as follows, to-wit:

2. The Court erred in allowing the witness, Charles Hunter, to testify, and in overruling the objections of the defendant on the ground that said Hunter had been convicted of a felony and in accepting the telegram as evidence that said witness had been pardoned and restored to citizenship.

3. The Court erred in allowing the witness, Andrew Gilbeau, to testify relative to the kind of bottles which he picked up and the particular labels upon the same, and this without requiring the said witness to produce the said bottles and labels or account for them.

4. The Court erred in allowing the following question to be asked of the witness, Philip Hull, and answered on cross-examination:

Q. Who was with you when that was cached the day before that?

5. The Court erred in allowing the following

question to be asked the witness, Harry Pritchett, and answered:

Q. Well, what did you do or what did he say to you, if anything?

6. The Court erred in permitting the United States attorney in his argument to the jury to read to them a portion of the testimony of Joe Pablo as transcribed by the stenographer, and which part of the testimony so read by said attorney was substantially the following:

Q. Well, now, if I had this right, the witness that mentioned it said that he thought that that was the time, just before you went to the hand game; isn't that it? Before, if I got it right. Did you, before going to the hand game, go down to the Chinaman and get a bottle?

A. I believe I did, yes.

And this without requesting said district attorney to read the questions and answers following the above and of said witness and as shown by the record.

7. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

8. The Court erred in refusing to give to the

jury the following instruction requested by the defendant:

You are instructed as a matter of law, that if you believe from the evidence that the witness, Lawrence Pritchett, actually committed or assisted or participated in the commission of the offense charged in the indictment, then he is an accomplice.

9. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witness; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you.

10. The Court erred in refusing to give to the jury the following instruction requested by the defendant:

Although you may find beyond a reasonable doubt that some of the persons riding in the automobile with the defendant had intoxicating liquor concealed upon or about their persons, or in a covered package or packages, while off the reservation, and that the same was conveyed in this manner into the reservation; still, this is not sufficient to convict the defendant unless you further find, beyond a

reasonable doubt, that the defendant knew, or as a reasonable person should have known, that such liquor was thus being conveyed in his machine and in this way introduced by him into the Flathead Indian Reservation.

11. In connection with the Court's refusal to give the defendant's proposed instructions relative to the witness, Lawrence Pritchett, being an accomplice, the Court further erred in instructing the jury, in regard to said witness, Lawrence Pritchett, in the following language, to-wit:

"As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice."

12. The Court erred in holding the evidence sufficient to warrant the jury in finding the defendant guilty.

13. The Court erred in denying the motion of the defendant in arrest of judgment.

14. The Court erred in passing sentence upon the defendant.

15. The Court erred in overruling the defendant's motion for a new trial.

ARGUMENT.

I.

The Court erred in allowing the witness, Hunter to testify and in overruling the objections of the defendant on the ground that said Hunter had been

convicted of a felony and in accepting the telegram as evidence that said witness had been pardoned and restored to citizenship. Tr. pp. 15 and 16.

Fourth As. of Error.

It will be observed that at the trial two things were conceded: first, that the witness, Hunter, had been convicted in said court of a felony, and judgment had been entered against him in the month of February, 1914, thus making him incompetent to testify; second, that to remove the objection of his conviction a telegram was offered by the Government purporting to show that the said witness, Hunter, had been pardoned by the President, and the court being satisfied with the evidence offered over the defendant's objections allowed the witness to testify.

The competency of one convicted of a felony to testify is only restored by full and complete pardon.

Boyd *vs.* U. S., 142 U. S. 450.
Logan *vs* U. S., 144 U. S. 303.
U. S. *vs.* Hughes, 175 Fed. 238.
Yarborough *vs.* State, 41 Ala. 405.
People *vs.* Bowen, 43 Cal. 439.
Id. 13 Am. R. 148.
Singleton *vs.* State (Fla.), 34 L. R. A. 251.
Thompson *vs.* U. S., 202 Fed. 401.
Id. 120 C. C. A. 575.
Id. With extensive note, 47 L. R. A. N. S. 206.
Osborne *vs.* U. S., 91 U. S. 474; 95 U. S. 153.

A limited pardon does not restore the competency of a witness convicted of a felony.

State *vs.* Timmons, 2 Hawr. (Del.) 259.
Perkins *vs.* Stevens, 24 Pick. 277.
Carr *vs.* State, 19 Tex. App. 463.
Id. 53 Am. Rep. 395.

The pardon must be proved by the producton of the charter of pardon under the Great Seal.

1 Wig. on Ev., Sec. 523, Sub. 2.
U. S. *vs.* Jones, 2 Wheeler C. C. 451.

While the disability now under discussion may be removed either by the granting of a pardon or by the reversal of the judgment, yet the proof of such pardon or reversal *must* be by the proper documentary evidence under the general rule that the best evidence must be produced.

Jones on Evidence, §718.

"It would follow that if a judgment appears to have been rendered the party offering the witness must show that it has been reversed or the offence pardoned."

1 Wig. on Ev. Sec. 521. Note citing.
State *vs.* Howard, 19 Kans., 507, 509.
State *vs.* Clark, 60 Kans., 450; 56 Pac. 767.

When Hunter was produced as a witness he stood a convicted felon in said court and as appeared by the record of the court then produced. It seemed to be admitted by the prosecution as also by the court, that the witness had been legally convicted and that such a judgment stood against him in that same court. No showing of any kind was made that the pardon granted Hunter was full and complete, nor what the nature or the effect of the same

might be. A telegram was produced by the district attorney and the statement made by him that the telegram was from the Department of Justice and that the President had pardoned the witness Hunter and the Court read the telegram. (Tr. p. 16.)

In the case of Singleton *vs.* State of Florida, 34 L. R. A. 251, the state introduced one Howard Bishop, who had been convicted of a felony, as a witness and to testify to material and damaging facts against the accused. In the language of that court:

"It is not deemed necessary to set out the testimony of the witness as there can be no doubt that it bore directly on defendant's guilt, was calculated to influence the jury and if improperly admitted was harmful and cannot be considered otherwise than as reversible error."

"BEST EVIDENCE," "PRODUCTION."

The third assignment of error (Tr. p. 101) is as follows:

3. The Court erred in allowing the witness, Andrew Gilbeau, to testify relative to the kind of bottles which he picked up and the particular labels upon the same, and this without requiring the said witness to produce the said bottles and labels or account for them.

In the consideration thereof we will quote a part of the testimony of the witness, Gilbeau, prior and leading to the objection then made. (Tr. pp. 40-41):

"When I was going that road I saw them drinking out of bottles. When we came back we got a number of bottles there. This was after we came back. Liquor, that is whiskey, had been in the bottles. I could tell by smelling of the bottles. These we picked up right alongside of the track, right where I seen that they were breaking the bottles. It was a pint bottle and a big bottle. I picked up parts of them and could tell there was labels on them. I picked up one bottle."

By Mr. Besancon: We object to the witness testifying to the labels on the bottle. I think the witness said that it looked like these pieces. The witness is not able to identify the bottle that he said he picked up.

By the Court: He can testify with reference to them, and you can cross-examine with reference to it. They are not bound to produce them. The objection is overruled.

(Exception noted by the defendant.)

The witness then proceeded to testify as follows:

"As to the kind of bottle, it was one of those pint bottles: it was a big bottle, a flask, and it had a label on. The label had never been broken off the bottle. I didn't notice what make it was. I know it was a whiskey bottle and that whiskey was written on the label."

By a fair construction of the above testimony it will be seen that although the statements of the witness are somewhat conflicting, still, as a whole, he testified as to having picked up one bottle and that he read the label on the bottle and that there was writing on the label and from such writing he determined or assisted in determining the contents of the bottle. The testimony

also shows that the bottle was in the witness' possession, at least after he picked it up. Nothing appears as to where it may have been at the time of the trial, and by the ruling of the Court the prosecution was excused from producing the bottle and the label and giving any reason for its non-production.

The plaintiff in error contends that the label was a writing and the best evidence of its contents and that it should have been produced or accounted for, and that it was error to allow the witness to testify as to the words or contents of the writing on the label without producing it or accounting for it.

This will be treated under the "Best Evidence" rule, and we know of no authority that has treated this question more extensively than Wigmore on Evidence in Vol. II., beginning at §1171. In §1175 of the same volume we find that the rule prefers the thing itself to any evidence about the thing.

At §1178 of the same volume we quote the following:

> "The rule may be stated, for convenience in examining its details and distinctions, in the following parts: (a) in proving a writing, (b) production must be made, (c) unless it is not feasible, (d) of the writing itself, (e) whenever the purpose is to establish its terms."

In the case at bar the label was unquestionably a "writing." In II. Wig. §1183 and under the

above subdivision "a" we find the definition and rule as to what is considered documents or writings, and we quote such section here in full:

> "Sec.1183. RULE APPLICABLE TOALL KINDS OF WRITINGS. When the thing in question comes strictly within the class commonly termed 'documents' or 'writings,' i. e. things of paper or parchment employed solely as a material for bearing words written or printed in the form of complete clauses or sentences expressing connected thought, there is no further distinction to be made. The rule is applicable to all kinds of writings. The original doctrine of profert affected only records and instruments under seal, and applied in civil cases only; but by a gradual development, already noticed (ante, §1177), the rule requiring production in evidence came to be settled, by the 1700s, as including in its scope any and every kind of document, from a record or a deed to a letter or a memorandum, and as applicable equally in criminal and in civil cases."

Under "b", "Production", we quote a part of §1186:

> "The rule is that production *must* be made; it says nothing, in itself, as to whether production *may* be made."

Under subdivision "c" id. Vol. §1192, we quote such section:

> "§1192. General Principle; Unavailability of the Original; Proof to the Judge. (1) The essential principle of preferred evidence is that it is to be procured and offered if it can be had (ante. §1172). That thought dominates both the present rule preferring production of the document itself and the ensuing class of rules preferring one kind of

> witness to another kind (post, §1286). The thought is here not that a certain kind of evidence is absolutely necessary, but that a certain kind is to be used if it is available. If it is not available, then it is not insisted upon."

Under subdivision "d" relative to the production of the writing itself, beginning the same volume §1231, we find a comprehensive discourse on what must be produced.

Under subdivision "e", "Whenever the purpose is to establish its terms," beginning at §1242 of the same volume, we find this subject fully and elaborately discussed.

Our contention is that nowhere in the rules of evidence have we found any authority, under circumstances such as arose in this case, that would allow a witness to state that a writing came into his possession and over objection be allowed to testify as to the contents of such writing and as to the words and figures, etc., contained upon the same without producing the original or accounting for it in some satisfactory manner that would allow secondardy evidence of its contents.

WAIVER.

IV.

For the reasons given in Part IV of the statement of the case as contained in this brief no argument is advanced on the fourth assignment of error.

IMPEACHMENT.

V.

The testimony and objections relating to the witness Harry Pritchett is found at Tr. pp. 80, 81, also in Part V of the preceding statement of the case and forms the basis of the fifth assignment of error. The testimony and objections will not be repeated here.

We particularly call attention to the objections of the then defendant on the ground that the question asked such witness was not a proper impeaching question and the ruling of the court conceding this position and stating that the testimony might serve other purposes and the further statement of the court, "You can always contradict the defendant on material matters."

It is clear from the testimony given by the witness Harry Pritchett that the prosecution then desired to bring forth a new line of testimony against the defendant. It could not have been to contradict the defendant on material matters. We cannot find in the record that the defendant had testified that he did have or did not have liquor at that particular hand game. The question asked of the witness was big and broad enough to allow such witness to testify to entirely new facts which might be the basis of an entirely new charge or offence against the defendant.

> "To conradict the defendant on material matters he must have testified to such matters."

Vo. II Wig. on Ev., §1000, *et seq.*

It certainly was not proper to attempt in rebuttal to charge the defendant with another and distinct offence and by this process of elimination we cannot see any other purpose or object for this testimony than an attempt to impeach the defendant, showing that regardless of his former declarations and statements that he, the defendant, did have liquor on or about him at a particular time and place and if this was the purpose then we fail to find in any examination of this defendant any testimony of his that would justify such an attempt to impeach him.

It seems the prosecuting attorney did ask the defendant whether he knew Harry Pritchett, Lawrence's brother, and he answered that he did and had seen him a few times (Tr. p. 56). This, of course, did not constitute a proper and necessary preliminary warning that should have been given to the defendant before inquiring of the witness Harry Pritchett. (Vo. II Wig. on Ev. §1025.)

For these reasons we believe that the objection to the testimony to be given by such witness Harry Pritchett should have been sustained, and as will appear by the record (Tr. p. 81) such witness gave very damaging testimony against the defendant such as would tend to prejudice him in the minds of the jurors.

MISCONDUCT.

VI.

The plaintiff in error again calls the court's attention to his sixth assignment of error (Tr. p. 102) and the testimony relative to the same (Tr. pp. 48-53 and 86), all of which testimony, the objections to the reading of the part thereof by the prosecuting attorney and the exceptions to the ruling of the court, are fully set forth in Part VI of the statement of the case in this brief.

We have examined the transcript notes of the court stenographer and the original bill of exceptions, as well as the transcript in this case, and do not find therefrom any mention as to whether such part of the testimony was read by the United States attorney in his opening or closing remarks to the jury. However, the fact is that this was done in the closing argument by the attorney, and we do not think the government will contend otherwise, and being in his closing argument there was no possible chance for the attorneys for the then defendant to refute the same in argument.

We contend that in thus placing before the jury a part of the testimony of the defendant which part contained an admission of guilt while if all of the testimony had been read the exact opposite would have been shown, constituted misconduct on the part of the prosecuting attorney, and further, that the ruling of the court at such time precluded any further objection and any request to

have the court caution the jury to disregard such alleged misconduct of the prosecution.

The reading of a part of the testimony showing one meaning although it is a correct reading of this part, still constitutes a misstatement of the testimony, and here the prosecution by its conduct compelled the defendant to be a witness against himself and the jury were told that the defendant had admitted his guilt when, as a matter of fact, no such inference nor conclusion could be drawn from all of the testimony. (Art. V. Amd. to U. S. Constitution.)

> "A prosecutor in a criminal trial has no right in arguing a cause, to state as a fact any matter not borne out by the testimony."
>
> Palin *v.* State (Neb.), 57 NW. 746.
>
> "A defendant claiming that the prosecutor is not correctly quoting his testimony to the jury should request that all of the testimony be read and the court should request this to be done."
>
> Stuckey *vs.* Fritsche (Wis.), 46 N. W. 60.

In the case at bar it will be noticed that the court left this as a matter optional with the prosecution as to how much or what part of the testimony he might use or read. This certainly was error as it was a matter within the power and control of the court.

We believe our objection was timely and well taken.

(Abbotts Cr. Tr. Brief 601.)

"It is error to allow the prosecuting attorney, against defendant's objections, to argue from facts not in evidence."

Abbotts Cr. Tr. Brief 606.
People *v.* Mitchell, 62 Cal. 411.

"When the prosecuting officer has indulged in argument not supported by the record or makes use of unfair or prejudicial statements, either in argument or the examination of witnesses, or at any other time in the presence of the jury, the defense should at once object, and thereupon it becomes the duty of the court to instruct the jury not to consider what the prosecuting officer has said and the remarks or argument or statement should also be withdrawn by the prosecuting officer."

Atwells Fed. Cr. Law §22a. Citing:
Higgins *vs.* U. S., 185 Fed. 710.
Donaldson *vs.* U. S., 208 Fed. 4.
Steward *vs.* U. S., 211 Fed. 41.
Fish *vs.* U. S., 215 Fed. 545.
L. R. A. 1915-A 810.
And others.

"The situation made by the prosecuting attorney was under the circumstances highly improper and not having been withdrawn, and the objections to it being overruled by the court it tended to prejudice the rights of the accused to a fair and impartial trial."

Williams *v.* U. S., 168 U. S. 382.

See also:
Hill *vs.* U. S., 150 U. S. 76.
Lowdon *vs.* U. S., 149 Fed. 677; 46 L. R. A. 641-653.

"The fact that the district attorney states some portion of the evidence erroneously or makes exaggerated statements as to its strength is not error unless it is clear to

the court that the accused was prejudiced thereby."

12 Cyc. 575 and cases cited.

However, it certainly cannot be contended that the intent, purpose and effect of the prosecution reading such part of the defendant's testimony did prejudice the defendant and, in fact, place him before the jury as a confessed and admitted criminal.

We find that this court seriously considered the question of the misconduct of the prosecuting attorney in the Diggs case, 220 Fed. 556 and in such decision cited:

People *v.* Shears (Cal.), 65 Pac. 295.
People *v.* Babcock (Cal.), 117 Pac. 594.
Dunlop *vs.* U. S., 165 U. S. 486.
Chadwick *vs.* U. S., 141 Fed. 225-245.

We quote from Mr. Justice Lurton in the Chadwick case above cited:

"But when facts not in evidence are stated to the jury, or arguments advanced plainly not justified by the evidence, and calculated to arouse prejudices incompatible with even-handed justice or an orderly course of procedure, it is the right and privilege of the counsel for the accused to object and ask the interference of the court and to except when the court denies the appeal. But to entitle the accused to a reversal when objection is made and the language not withdrawn it must appear that the matter objected to was plainly unwarranted and so improper as to be clearly injurious to the accused."

Citing the Dunlop case, and also:
Kellogg *vs.* U. S., 103 Fed. 200, 43 C. C. A. 179.

INSTRUCTIONS—ACCOMPLICES.
VII, VIII, IX AND XI.

This part of the brief has reference to the instructions requested by the defendant, being numbers 1, 2 and 3 (Tr. pp. 84, 85) set forth fully in the statement of the case in this brief under paragraphs VII, VIII and IX and being under the same numbers in the assignments of error, and also to the instructions given by the court relative to the witness Lawrence Pritchett found at Tr. p. 93, also the 11th assignment of error (Tr. p. 103) and Part XI of the statement of the case in this brief. The failure to give the first three instructions above noted and the giving of the fourth constituting the error complained of.

It will be noted in this case that the defendant was found guilty on Count Three of the indictment, said Count Three being set forth at Tr. pp. 13 and 14, being based on what took place on the 5th day of October, 1915, and all the facts connected therewith and alleged to have occurred on the trip of the defendant and others from the city of Missoula to the Flathead Indian reservation.

From a consideration of the entire testimony in this case we believe it will be noted that the prosecution relied almost wholly upon the testimony of the two witnesses Charlie Hunter and Lawrence Pritchett, and without such testimony no conviction would have resulted nor could be sustained. It is even difficult to find anything corroborating

the testimony of those two witnesses; so we have almost concluded that the testimony of such witnesses convicted the defendant.

As to the witness Hunter, the record of a former conviction stood against him to affect his credibility and the court commented on this in his instructions (Tr. p. 89) and also in the same instruction (Tr. p. 92) the court commented on the fact of Hunter taking part in the occurrences and that he might be an accomplice, and although not declaring him such still we believe the jury could infer from the remarks of the court that Hunter was placed in such position and that his testimony should be weighed accordingly. So the failure to give the instructions above noted and the giving of the instruction of the court are to be considered in reference to the witness Lawrence Pritchett.

For convenience we will again quote the instructions requested and refused by the court, being numbered by the then defendant 1, 2 and 3, and in the following language:

1. An accomplice is one involved, either directly or indirectly, in the commission of the offense; and who in some manner aids, assists or participates in the commission of the criminal act.

2. You are instructed as a matter of law, that if you believe from the evidence that the witness Lawrence Pritchett actually committed or assisted or participated in the commission of the offence

charged in the indictment, then he is an accomplice.

3. The testimony of accomplices is competent evidence, and the credibility of accomplices is for the jury to consider as they consider the testimony of any other witness; and, while the testimony of an accomplice or accomplices will sustain a verdict when uncorroborated, yet their testimony must be received with great caution and their interest in the result of this action should be seriously considered by you. (Tr. pp. 84, 85.)

And we again quote the instruction given by the court with reference to the witness Lawrence Pritchett:

> "As far as Lawrence Pritchett is concerned, I don't see from this evidence that he was an accomplice. The evidence is that Hunter bought the liquor. The fact that Pritchett stood by, taking no part in it, would not make him an accomplice." (Tr. p. 93.)

We believe the definition of an accomplice is well stated in 12 Cyc. 445, in the following language:

> "The test by which to determine whether one is an accomplice is to ascertain whether he could be indicted for the offence for which the accused is being tried." Citing:
>
> People *vs.* Collum, 122 Cal. 186; 54 Pac. 589.
>
> State *vs.* Jones, 115 Iowa 113; 88 N.W. 196.
>
> Territory *vs.* Baker, 4 N. M. 236; 13 Pac. 30.

The above definition being cited by this court in

Diggs *vs.* U. S. 220 Fed. 545.

"Whether a witness is an accomplice is a question of fact to be determined by the jury under instruction from the court as to the law."

12 Cyc 446, citing 12 Cyc 449j, in the following language:

"The question whether the participation of the witness in the crime makes him an accomplice is one of fact for the jury to determine from all the circumstances, both under instructions from the court as to the necessity for the criminal intent and other elements which are necessary to constitute one an accomplice."

Again citing:

People *vs.* Compton, 123 Cal. 403; 56 Pac. 44.

People *vs.* Curlee, 53 Cal. 604.

State *vs.* Spotted Hawk, 22 Mont. 33; 55 Pac. 1026.

The above definition is accepted and approved by the following decisions:

Stone *vs.* State, 118 Ga. 705; 45 SE. 630.

State *vs.* Duff, 144 Ia. 142; 122 N. W. 829.

State *vs.* Gordon, 105 Minn. 217; 117 N. W. 483.

State *vs.* Douglas, 26 Nev. 196; 65 Pac. 802.

State *vs.* Durnam, 73 Minn. 165; 75 N. W. 1127.

Dunn *vs.* People, 29 N. Y. 523; 86 Am. Dec. 319.

Sanches *vs.* State, 48 Tex. Crim. 591; 90 S. W. 641.

Other definitions of accomplice following:

"An accomplice is one who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime." Jones on Ev. §768.

"To constitute an accomplice he must have participated in the criminal intent." Abbott's Crim. Tr. Brief, 622.

"According to some definitions the word 'accomplice' includes all persons who participated in the commission of the crime, whether they do so as principals or aiders and abettors before the fact."

Ledering *vs.* Com. 132 Ky. 666; 117 S.W. 253; 136 A. S. R. 192.
Also Note 2, 138 A. S. R. 274.
State *vs.* Duff, 122 N. W. 829.
See also 21 L. R. A., N. S. 878.
People *vs.* Coffey, 161 Cal. 433; 119 Pac. 901.
Cross *vs.* People, 47 Ill., 152; 95 Am. Dec. 474.
McClain Crim. Law, §§195-203.

"Whether or not a witness is an accomplice is, generally speaking, a question of fact for the jury."

People *vs.* Kraker, 72 Cal. 459; 14 Pac. 196.
State *vs.* Keller, 8 N. D. 563; 80 N. W. 476.
Driggers *vs.* U. S., 21 Okl. 60; 95 Pac. 612.
Williams *vs.* State, 33 Tex. Crim. 128; 25 S. W. 629.
Porath *vs.* State, 90 Wis. 527; 63 N. W. 1061.

Tested by the above rules and weighed accordingly the question arises as to whether or not Lawrence Pritchett was an accomplice. We unquestionably believe that he was an accomplice, and

was proven so by nearly all of the witnesses who testified in this case. We wish to call the court's attention to some of this testimony and will briefly comment on it with the transcript page where found:

He was with Hunter, the defendant, and others at Missoula before they started on the trip, and went with Hunter to secure some whiskey at the Frog Pond (Tr. p. 17). He got into the car with the others and when Hunter says "The two pints we got at the Montana Bar" Lawrence Pritchett was with him. Lawrence sat in the hind seat with Hunter (Tr. p. 18). They were all pretty near drunk, Lawrence and the others. Lawrence and the others had drinks at Couture's place (Tr. p. 19). Again, Lawrence went with Hunter to the Frog Pond and with him to the Montana Bar; at both places liquor was secured (Tr. p. 22). Somebody got out and picked up a bottle a few miles out of Missoula (Tr. p. 24). The witness Stephens thinks it was Pritchett that got out of the car where he got something and brought it back with him (Tr. p. 28). Again, from Pritchett's own testimony, he says when they picked up a quart bottle along the road it had a paper around it and they took the paper off and put it under the back seat (Tr. p. 31). Again, he and the others had a drink at Couture's place (Tr. p. 32). Again, on another trip on the reservation, Lawrence sat in the back seat of the car with others and the bottle

was passed from there (Tr. p. 37). Again, at Blue-eyed Mary's place on the reservation Pritchett took a bottle and passed it around (Tr. p. 39). Again, Lawrence went out in the brush and got a bottle and passed it around (Tr. p. 46). At the hand game Lawrence brought some over and seemed to have a cache in a hay stack somewhere and furnished the same to whoever wanted it (Tr. p. 47). Again, Lawrence asked to stop the car in Missoula and four or five miles out of town again asked to stop, where he went out to a fence. Later he pulled out a bottle and passed it around (Tr. p. 50). Again, he invited the party over to Blue-eyed Mary's place, where he, Lawrence, had a quart or a pint of whiskey (Tr. p. 54). Lawrence asked them to stop at the Montana Bar (Tr. p. 55). After they got out of town Lawrence passed a bottle around (Tr. p. 55). He asked them to stop a short distance out of town where he got out and went over to a fence for something (Tr. p. 55). Lawrence said he had a cache and went and took it out himself and passed the bottle around (Tr. p. 56). Lawrence had some whiskey at Blue-eyed Mary's place (Tr. p. 57). Lawrence and Hunter got out of the car and went up the street, where they were found in a saloon drinking at the bar, and that is the saloon where the liquor was obtained (Tr. p. 61). About four miles out of Missoula Lawrence jumped out and got a bottle that had been left there the day before (Tr. p. 62). This bottle of

whiskey had been cached there by members of the same party the day before (Tr. p. 66). Another witness saw Lawrence hand a bottle to Joe on the reservation, having obtained it around a stack (Tr. p. 74). Lawrence had some liquor the day at the hand game (Tr. p. 84). Together with all of the other testimony in the entire transcript which connects Lawrence Pritchett with the obtaining, handling and giving of whiskey and liquor when off the reservation and on the reservation and when in company with the defendant and others.

We are not unmindful of the rule followed in criminal trials in the federal court to the effect that a trial court is not required to caution juries not accepting the evidence of an accomplice without material corroboration, etc., although this seems to be the rule in practically every state court. To quote Judge Archibald in Richardson *vs.* U. S., 181 Fed. 1:

> "No doubt there is a well established practice, sanctioned by long practice and judicial approbation, to caution jurors about accepting the evidence of an accomplice without material corroboration, coming, as it does, from a polluted source, but this is as far as the matter goes."

In the above action Judge Archibald cited:

> Holmgren *vs.* U. S., 272 U. S. 509.
> Id. 30 Sup. Ct. 588.

These cases are also cited by the decisions in this court:

Lung *vs.* U. S., 218 Fed. 817.
Diggs *vs.* U. S., 220 Fed. 545.

"So manifest is the danger of convicting a man on evidence from a source confessedly corrupt and delivered by the witness to shield himself from merited punishment that the judges, while explaining to the jurors their right to convict, by way of caution advise them not to return a verdict of guilty unless it is corroborated by evidence from a purer source; yet they are not as of law required to give this advice."

Atwell's Fed. Crim. Law §42b. Citing:
Bishop New Crim. Proc. 2nd Vol., §1169.

It should not be overlooked in this case that the witness Lawrence Pritchett was impeached for truth and veracity by the witnesses Archie Grant (Tr. p. 78), Mrs. Couture (Tr. p. 77) and Frank Kirkpatrick (Tr. p. 78). And this, in connection with his participation in the criminal acts, did not make him a pure and credible witness.

We believe the instructions offered should all have been given, and especially 2, relative to the witness Pritchett, and that it was error on the part of the court not to give these instructions. However, for the court to instruct the jury that Lawrence Pritchett was not an accomplice in the opinion of the court and to cite to the jury one instance of Pritchett standing by and taking no part when the liquor was passed in substantiation thereof placed this witness before the jury as not only not an accomplice but as a witness entitled

to full credit; in other words, a witness who is pure and not charged with any wrongful participation in the offence and entitled to full credit as such. In doing this we believe the court committed reversible error, for, as already stated, the evidence to support a conviction of the defendant on the Third Count rested upon the testimony of Hunter and Pritchett and the court could not single out one of these witnesses and absolve him of all wrongdoing without serious prejudice to the defendant.

Lawrence Pritchett certainly could have been indicted on all three of the counts charged against the defendant and could have been convicted on each and all of these counts. Pritchett and Hunter were the leaders and instigators during practically all of the occurrences that led up to these charges and both should properly have been charged with the crime, whether the then defendant was so charged or not.

KNOWLEDGE—INSTRUCTION.

X.

We wish to briefly call attention to the defendant's requested instruction No. 4 (Tr. p. 85) set forth in full in Part X of the statement of the case in this brief. This requested instruction was also refused by the court. We believe that the instruction was proper. Certainly the defendant should not and could not have been properly convicted on the third count unless he knew or as a reasonable

person should have known that liquor was being conveyed in his machine and in that way introduced into the Flathead Indian reservation.

It will be noted that the court, in its instructions to the jury (Tr. p. 93), did instruct on this phase of the case. However, in the instruction to the jury the court laid particular stress on the fact that if the liquor was Hunter's and the defendant knew nothing about it he, the defendant, would be guiltless, and every time the court approached this subject in the instructions it was to single out Hunter and the fact that Hunter might have placed it or had liquor in the automobile. Our contention is that the instructions as requested which referred to all persons riding in the automobile and whether or not they had any liquor, should have been given to the jury or the jury should have been charged substantially to the same effect.

Although there is plenty of testimony to the effect that Hunter placed liquor in the machine and had it there, there is likewise a large amount of testimony that Lawrence Pritchett did the same, and there is also testimony that Charlie Stephens and other passengers had some liquor. The charge to the jury was not comprehensive enough to include all of the persons riding in the machine and for that reason was erroneous and left with the jury the impression that the defendant was guilty, except in the one instance, and that

would be when Hunter had the liquor and the defendant had no knowledge of this fact.

CONCLUSION.

XII, XIII, XIV, XV.

We therefore respectfully submit that the defendant was not given a fair and impartial trial to which he was entitled under the law and the rules of evidence. That all of the evidence in the entire case was not sufficient to warrant the jury in finding him guilty. That his motion in arrest of judgment should have been sustained. That no sentence should have been passed upon him and no judgment entered against him, and when this was done that his motion for new trial should have been sustained. For the manifest errors of the court below and all as set forth in this brief the conviction and judgment against the plaintiff in error should be set aside and this case should in all things be reversed.

ALBERT BESANCON,
JOHN P. SWEE,
Attorneys for Plaintiff in Error.

Dated: January 6th, 1917.

No. 2873

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

JOE PABLO,
Plaintiff in Error,

vs

UNITED STATES OF AMERICA,
Defendant in Error.

APPELLEE'S BRIEF.

B. K. WHEELER,
United States Attorney,
District of Montana.

HOMER G. MURPHY,
Assistant U. S. Attorney,
District of Montana.

JAMES H. BALDWIN,
Assistant U. S. Attorney,
District of Montana.
Solicitors for Appellee.

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IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

JOE PABLO,
Plaintiff in Error,

vs

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Defendant in Error.

In the above entitled cause we have been served with the printed brief of the plaintiff in error, and upon such brief we desire to base the following motion:

Comes now the United States of America, defendant in error, in the above entitled cause, and moves this Honorable Court to dismiss the appeal of the above named plaintiff in error for the reason and upon the ground that the brief heretofore served and filed herein by the plaintiff in error does not con-

tain a specification of the errors relied upon as required by Subdivision B of Rule 24 of the rules of the above entitled court, adopted November 1, 1894, as amended June 2, 1916, or specification of errors in proper form or manner.

WHEREFORE defendant in error prays that the appeal of plaintiff in error herein be dismissed.

ARGUMENT ON MOTION

In the brief of plaintiff in error served and filed, which is defective by reason of a lack of specification of errors as required by the rules of this court, there is a mass of disconnected paragraphs which in themselves do not set out the testimony objected to and the objections themselves, which makes it difficult, indeed, for a logical reply to be framed by the defendant in error. We submit that the court should grant the motion to dismiss this appeal.

ARGUMENT ON MERITS.

In the event this court should not grant the foregoing motion, we desire to observe the following:

The statement of the case contained in the purported brief of plaintiff in error herein is erroneous and most misleading, for, although it is true, as appears from the indictment in the record (Tr. pp. 2-4) that the plaintiff in error was indicted on three separate charges contained in three separate counts in said indictment, nevertheless the jury by its verdict (Tr. p. 8) acquitted the plaintiff in error as to counts one and two of the indictment and found him

guilty in manner and form as charged in count three thereof. To this extent we wish to correct the statement of the case in paragraph 1, page 3 of the brief of plaintiff in error.

It is well to bear in mind in this case that many of the labored arguments of plaintiff in error are made in an effort to show that reversible error was committed in the trial of the case, but we submit that if any error was committed by the trial court relating to evidence introduced for the purpose of sustaining the charges contained in counts one and two of the indictment or by instructions to the jury properly excepted as to those counts, that inasmuch as the government had made out a case that was warranted to go to the jury, such error cannot affect the verdict of the jury as to count three, which is the sole one upon which Pablo was convicted (Tr. p. 8).

See: Diggs v. U. S., 220 Fed. 545 at page 553;
Cook vs. U. S., 159 Fed. 919.

This is such a self-evident proposition that we do not burden the court with useless citation of authorities.

THE TESTIMONY OF CHARLES HUNTER.

The telegraphic communication of the fact that the President had pardoned Charles Hunter was sufficient to apprise the court of an executive act of the President, and as the trial judge said when such act was called to the attention of the court he could

take judicial notice of it, and counsel for plaintiff in error himself stated he could not question the telegram (Tr. p. 15, lines 31-32) Indeed, the court stated if an error had occurred and no pardon had been actually granted it could be called to the attention of the court on a motion to set aside the verdict (Tr. p. 16, lines 3-16). No such motion was ever made and, indeed, no attempt could have been made to show the pardon was not granted as the court was informed had been done, for the reason that the pardon was duly received through the mails in due time and counsel himself for plaintiff in error so advised. It was never imagined that an attempt would ever be made to secure a reversal of this case on any such ground, or an interpolation of such fact would have been made in the record such as plaintiff in error was permitted to do on page 16, lines 28-32.

Of course, the evidence of Hunter was not to the liking of plaintiff in error and we do not believe defendants as a general rule find any evidence of the prosecution's witnesses that is not damaging to the defense.

We have no fault to find with the authorities cited on page 20 of the brief of plaintiff in error insofar as they hold that the pardon should be full and complete. No question as to the completeness of pardon appears in the record in the case at bar, hence we can dismiss it from our consideration. There is no such thing as a charter of pardon under the great seal in the United States as mentioned

in lines 5 and 6, on page 21 of the brief of plaintiff in error, and that being the case his citations to the effect that one under the great seal must be produced is not in point. Plaintiff in error is merely trying to magnify an immaterial matter into something enormous for the purpose of securing a reversal on a technical ground, if indeed it should be thought that the judicial notice of the President's executive act was improper.

We are unable to see any relevancy of Singleton vs States, 35 L. R. A. 251 to the question now under consideration. We have under consideration the question as to whether or not a telegram advising that a full and complete pardon had been granted by President Wilson was sufficient evidence of the fact that Hunter had been fully pardoned. The telegram itself does not appear in the record and it is to be presumed that it was sufficient to apprise the court of the fact that a full and complete pardon had been granted. The last four lines on page 16 of the transcript are merely a gratuitous statement by counsel of plaintiff in error and are not the words of the telegram. We contend no error was committed by admitting Hunter's testimony as counsel do not contend that Hunter was not pardoned but merely that we did not produce the original pardon, which contention if sustained as reversible error would be to thwart justice by the most technical of technical reasons. The testimony of Hunter finds abundant corroboration throughout the record, even the testimony of plaintiff in error corroborates part

of that given by Hunter.

Hunter testified: He was in Missoula and left with Pablo, Hull, Pritchett, and Stevens in an automobile for Ronan on the Flathead Indian Reservation; that they stopped at the Montana Bar and he and Pritchett got out and went in to get liquor, which they did; the entire party started on the trip to Ronan, had drinks on the way; stopped a few miles out and got a bottle which was cached along the road by a fence; Pablo drank as did the rest except Hull; they proceeded to the reservation stopping at Johnny Matts, Coutures, Pritchett's homes, Pablo's house and then went on to Ronan (Tr. pp. 15-26). At least as to this portion of Hunter's testimony corroboration is to be found in the testimony of the following witnesses: Charles Stevens (Tr. pp. 27-30) as to the trip as far as Matt's; Lawrence Pritchett (Tr. pp. 30-32; 33-34) as to the trip as far as Pritchett's house; Joe Pablo's (testimony of plaintiff in error) (Tr. pp. 49, 50, 51, down to cross examination on page 52; from line 9 page 54 down to line 15 on page 56). Pablo's testimony, of course, contains many denials of various things Hunter testified to but in the main the passages referred to show Hunter was truthfully testifying.

The witness Phil Hull, who was the driver of the car, corroborates a great deal of what Hunter testified to, sufficiently at least to show Hunter was truthful (Tr. pp. 61-68).

Gibeau (Tr. pp. 38-42); Ramsey (Tr. pp 43-44); Jaeck (Tr. pp. 68-70), and Thompson (Tr. pp. 70-

72) also corroborate Hunter as to what happened between St. Ignatius and Ronan.

So in the last analysis of Hunter's testimnoy we find so many testifying to practically everything he did that if by any chance it is thought error occurred by permitting him to testify under the circumstances, still the record contains evidence to the same effect to such an extent that no error sufficien or worthy of predicating a reversal thereon exists.

BEST EVIDENCE-PRODUCTION.

The third assignment of error is one based on an objection interposed by counsel, but neither the transcript of the record, page 41, or the specification of errors No. 3 quotes the question asked the witness and the objection interposed does not cover the point to which all arguments under this head is directed. The argument is entirely directed to the fact the best evidence as to what was on the labels was the lables themselves. The objection was "we object to the witness testifying to the labels on the bottles." There was no objection comprehensive enough to include the argument that plaintiff in error relies upon. The testimony merely was a description of the bottle itself and a statement that it had a label on it and on the label was the word "whiskey." We submit that no proper objection having been made that the admission of the testimony in itself is harmless.

The most that can be said of Gilbeau is that he

stated the label on the broken bottle had the word "whiskey" upon it. This far from a complete statement by him as to the contents of the label. It is at most a mere descriptive expression. We find by referring to page 44 of the transcript, lines 22-32, and page 45, lines 1 to 5, that the witness Ramsey testified that he got in the automobile at Ronan with Gilbeau and they went down to the place that Gilbeau pointed out as the point on the road where the Pablo automobile left the main road and took to the woods; that he and Gilbeau went around that road, looked for some broken bottles and he picked up some there at that time; Ramsey further stated that he could not tell what had been in the bottles except from the paper and the labels and that he knew the labels that were on the bottles; that the main label was "Joel B. Frazer Whiskey" and that there was a government stamp over the top of the bottle which said 100% proof 1/5 gallon. This complete testimony on the part of Ramsey as to what was upon the labels went in without any objection on the part of plaintiff in error and being corroborative, indeed, amplification of Gilbeau's testimony eliminated any possible chance of error by the trial court in permitting Gilbeau to testify as he did. Gilbeau and Ramsey are corroborated as to picking up the bottles by the testimony of Yaeck (Tr. p. 69, lines 26-31), and Thompson (Tr. p. 71, lines 22-24). Yaeck and Thompson were both witnesses for the plaintiff in error at the trial.

All of the citations of authorities contained in the

brief of plaintiff in error under this heading do not apply as the objection is not comprehensive enough to take in the scope of the argument and the points now relied upon by plaintiff in error as to this question.

TESTIMONY OF HARRY PRITCHETT.

The testimony urged to be error in subdivision V of the brief of plaintiff in error relates entirely to the testimony given by Pritchett as to the offenses charged in counts one and two of the indictment. As heretofore observed, plaintiff in error was acquitted of those two charges and the testimony so given was in no way related to the charge for which he was convicted in count three. Having no bearing on count three, it cannot be reversible error for the reason that the jury could not have considered it in any sense because the charges in counts one and two were alleged to have occurred on the 6th and 5th days of September, 1915, and the charge in count three is alleged to have occurred on October 5, 1915, or thirty days after the first two, so it could not have been confusing or misleading to the jury. Indeed, the objeection to this question was based on the fact that the witness had immediately preceding the question objected, stated "I did not have any conversation with him at that time to amount to anything; I saw him there." (Tr. p. 80, lines 28-30). The judge held that it was not for the witness to pass upon the fact as to whether Pablo had said something that amounted to anything. The United

States was trying to find out and did find out what the defendant said and the propriety of allowing witnesses to so testify fully appears by lines 15 et seq., on page 28 of the transcript.

As to the further objection that it was not a proper impeaching question, the court's comment that you can always contradict the defendant on material matter, is correct. Indeed, the objection does not state that there was no ground laid for the impeachment, but held that it was not a proper impeaching question, neither are tenable if both had been made properly. Indeed, this testimony was not concerning a separate offense on the part of plaintiff in error but was directly connected with the happenings on September 5th and 6th, and the hand game then going on at Arlee when and where the offenses charged in the first two counts of the indictment were alleged to have been committed and about which the defendant had testified fully and endeavored to place the guilt of having introduced the whiskey into the Indian Reservation upon this witness, Pritchett. There is no objection that it was not proper testimony in rebuttal.

MISCONDUCT.

The argument relating to the testimony of Pritchett in the paragraph last preceding as to the matter being one which related to counts one and two applies here also.

In order to assist the court we state that it is to be found at the bottom of page 85 of the transcript and

also on the first half of page 86 thereof. The slightest reading will show by comparison it was that portion of Pablo's testimony relating to the first two counts of the indictment of which he was acquitted. The part Mr. Wheeler read is found on page 48 of the transcript from line 12 to 17, and was a part of the direct examination of Pablo, for which the United States Attorney was in no manner responsible. Many a defendant when a witness will inadvertantly tell the truth, which we believe Pablo did in this instance. Again he might have misunderstood the question. Whichever way it was, was cearly a question for the consideration and determination of the jury and a proper subject for comment during the argument by the United States Attorney. The questions and answers following what Mr. Wheeler read were merely the clever ruse of counsel for the defendant Pablo in an effort to extricate him from a nasty admission which his counsel wished cleared up. The jury was the one to say whether he understood and answered the first question. Judging his testimony as a whole it is entirely probable and most possible that Jablo meant exactly what he said in answer to Mr. Besancon's question, for the emphasis in the question is the last part of it "did you go down to the Chinaman and get a bottle?" as that was one of the vital points as to that count. But as we have heretofore observed the error is harmless as it related to the first and second count.

The citations in the brief of plaintiff in error

under this heading are not in point, as Mr. Wheeler did not state a fact not borne out by the testimony or misquote any testimony; he read in full a portion only, which is entirely proper, and he made no exaggerated claims as to what the testimony showed. It can hardly be claimed that counsel for either side in a case must read an entire transcript of the testimony while arguing. Such a contention would be absurd.

INSTRUCTIONS — ACCOMPLICES.

The marvelous conclusion of counsel for plaintiff in error that "we have almost concluded that the testimony of such witnesses (Hunter and Pritchett) convicted the defendant" (Tr. p. 34, lines 1-13), clearly shows either a lack of careful study of the record or a desire to mislead this court. We have heretofore under the heading "Testimony of Charles Hunter" made a resume of the main facts wherein Hunter was corroborated, and inasmuch as the same is true as to Pritchett's testimony we will not repeat the same here.

The first rule of law in connection with accomplices is that under the common law a conviction upon the testimony of an accomplice was permissible, although such testimony was not corroborated. In many states the state laws have changed this rule and require the testimony of an accomplice to be corroborated. In other words the rule of law in many states forbids the conviction of anyone on the uncorroborated testimony of an accomplice. But

under the law of the United States a person charged with a crime may be convicted on the uncorroborated testimony of an accomplice. It is true the courts in some instances have modified this rule by decisions to which we will advert later.

In Wharton's Criminal Evidence (10th Ed.) Sec. 440, p. 922, an accomplice is defined as follows:

> "An accomplice is a person who knowingly, and with common intent with the principal offender, unites in the commission of a crime. The cooperation must be real and not merely apparent."

The definitions of accomplice given by plaintiff in error do not apply in Federal courts as they are all from states where there is a rule different from that in the Federal courts, hence the citations are not in point.

We find the question has often been treated by Federal courts and the rule as to accomplices clearly enunciated.

See

Hanley v. U. S., 123 Fed. 851;

Aheam v. U. S., 158 Fed. 606;

Richardson v. U. S., 181 Fed. 1;

Lung v. U. S., 218 Fed. 817;

Diggs v. U. S., 220 Fed. 545.

We submit that the instruction of the court as to

accomplices found on page 92 and the first four lines of page 93 fully covers the requested instructions numbered 1 and 3 and that being so no error occurred.

Kettenbach v. U. S., 202 Fed 377;

Bennett v. U. S., 227 U. S. 333.

The refusal to give requested instruction No. 3 was not error for the evidence discloses as to count 3 of the indictment that Pritchett was merely a passive onlooker and did not purchase, own or take part in the transportation of the liquor, indeed; he left the automobile before reaching Arlee and neither took with him or claimed any of the liquor as his own but permitted the others to ride off with the liquor which would have been done had he an interest in it. It is significant that plaintiff in error does not cite any Federal cases to support his contention as to this point. The cases cited by him are under state statutes and in no manner control this court.

We submit the question of accomplices was fully covered by the instructions of the court as given and no error occurred in refusing request numbered 3 as Pritchett is not shown by the testimony to come within the definition of an accomplice.

KNOWLEDGE—INSTRUCTION.

Requested instruction numbered 4 was properly refused as it was not warranted by the testimony and the court fully covered this phase of the case by

its instructions (Tr. p. 93 line 5 et seq.) The evidence conclusively showed that no one except Hunter and Pablo had any interest in the liquor. Stevens left the car first after having had the drinks en route, then Pritchett got out of the car, and the rest proceeded on the trip to Ronan with the liquor. Stephens and Pritchett certainly had no claim to the liquor or they would not have abandoned it thus if they were introducing it into the Indian country.

In conclusion we repeat that no error occurred on the trial of this case and the judge should be affirmed.

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